No. 89-5120

In The

Supreme Court of the United States

October Term, 1989

MICHAEL OWEN PERRY,

Petitioner,

VERSUS

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Louisiana

PETITIONER'S BRIEF ON THE MERITS

KEITH B. NORDYKE*
JUNE E. DENLINGER
NORDYKE AND DENLINGER
P.O. Box 237
Baton Rouge, Louisiana 70821
Telephone: (504) 383-1601

JOE GIARRUSSO, JR.
MCGLINCHEY, STAFFORD,
CELLINI & LANG
643 Magazine St.
New Orleans, Louisiana 70130
Telephone: (504) 586-1200

Counsel for Petitioner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW
ISSUES PRESENTED

I. Does the Eighth Amendment prohibit a State from forcibly injecting an insane death row inmate with mind-altering drugs when:

A. Such drugs are not being used for treatment but are administered solely in an attempt to make him competent to be executed;

B. The medication order does not permit the exercise of medical judgment;

C. The medication order gives no consideration to side effects or to the inmate's treatment needs;

D. The medication order permits no abatement of the medication even if it does not succeed in making the inmate competent; and

E. The inmate's medical history shows that, even with medication, he continually decompensates and his competency is at best transitory?

II. Does the use of medication to achieve competency for execution violate the Eighth Amendment when no state permits the use of medication for this purpose and when the majority of states place limits on the use of medication for non-treatment purposes?

III. Is this order a violation of the Fourteenth Amendment in light of Louisiana's law which prohibits the execution of the insane, requires that insane inmates be *treated* and prohibits the use of medication for non-treatment purposes?

QUESTIONS PRESENTED FOR REVIEW
ISSUES PRESENTED (Continued)

IV. Is this order a violation of the Fourteenth Amendment in that it considers only the State's interest in carrying out its sentence and fails to consider the inmate's interest in avoiding the forcible administration of psychotropic drugs?

V. Is this order a violation of the Fourteenth Amendment in that the trial court relied on hearsay and opinion evidence, provided to the court *ex parte*, without being subject to cross-examination?

VI. Does Justice Powell's concurrence in *Ford v. Wainright*, 477 U.S. 399 (1986) create an adequate standard for measuring competency to be executed? Should the test of competency to be executed also require that the record demonstrate some measure of stable and predictable competency? Should the test also require that the inmate be able to assist counsel when the inmate has post-conviction remedies available to him?

VII. Is an inmate competent to be executed when he suffers from an incurable, major psychotic illness and his comprehension is at best relative and fleeting even while under medication?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CITATIONS TO OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming, on direct appeal, Petitioner's conviction and sentence of death is reported at 502 So.2d 543 (La. 1986), *cert. denied*, 484 U.S. 872 (1987) and is reproduced in the Joint Appendix (J. A.) at 1-44.

The denial of petitioner's application for appeal or in the alternative writ of certiorari to the Louisiana Supreme Court on the question of forcible medication is reported at 543 So.2d 487 (La. 1989) and is reproduced at J.A. 150. The denial of petitioner's application for rehearing to the Louisiana Supreme Court is reported at 545 So.2d 1049 (La. 1989) and is reproduced at J.A. 151.

The remaining orders and rulings raising the questions presented for review are not published but are reproduced in the Joint Appendix. These include:

1. August 26, 1988 ruling, overruling defendant's objection to the use of *ex parte* materials submitted to the Court by the Louisiana Department of Corrections and ordering that such materials be entered as evidence. (J.A. 111-12).

2. October 21, 1988 reasons for judgment ordering forcible medication to achieve competence (J.A. 126-47).

3. Court's October 21, 1988 judgment ordering forcible medication (J.A. 148-49).

JURISDICTIONAL STATEMENT

This application seeks review of a judgment of the Louisiana Supreme Court, entered May 12, 1989, denying petitioner's appeal and alternative application for writ of certiorari. Petitioner's timely application for rehearing was denied June 16, 1989. Petitioner's Application for

Writ of Certiorari to this Honorable Court was granted on March 5, 1990.

The statutory ground for jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth Amendment which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

the Sixth Amendment which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and have the assistance of counsel for his defence.

the Fourteenth Amendment which provides in relevant part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Louisiana statutes and portions of the Louisiana Code of Criminal Procedure. These are set out in the Appendix to this brief.

STATEMENT OF THE CASE

Michael Perry suffers from schizoaffective disorder, a major psychotic illness. He has hallucinations and delusions. His thinking is disordered and tangential. His speech is rambling and incoherent. His behavior is bizarre and at times he is disoriented and does not know where he is. His emotional swings range from acute

depression and crying to manic hyperactivity and paranoia.

Perry's history of mental illness begins long before this crime. The first record of a diagnosis of schizophrenia was made during the process of a civil judicial commitment on March 23, 1981. The examining physicians found that he suffered from schizophrenia, had no insight into his illness, and may not know right from wrong. (Def.Ex.4 at 10,11; R. 543,544). That same day, Michael was civilly committed to Central Louisiana State Hospital. *Id.* at 11. Michael eloped from the hospital on April 13, 1981 and was returned shortly thereafter. *Id.* at 21. During this admission he showed delusional thinking and paranoid ideation. See generally Def.Ex.4 at 25-60; R. 543,544. He was discharged on May 22, 1981, with the diagnosis of paranoid schizophrenia. *Id.* at 5, 15 and 16.

On September 10, 1981, Michael was again judicially committed to Central State Hospital. *Id.* at 101. He was diagnosed again as paranoid schizophrenic. This admission was prompted by Michael's mother who gave a history of Michael's bizarre behavior such as burning his clothes and living in his automobile. *Id.* at 117. He again eloped on the day of admission. *Id.* at 108.

In 1983, Michael was arrested for murdering his mother, father, two cousins, and a nephew. After indictment, Michael's competence to stand trial was questioned. In October 1983, he was committed to Feliciana Forensic Facility (hereinafter "FFF") based upon an order of the trial court finding him incompetent to stand trial. See Judgment of October 5, 1983. Def.Ex.3, R. 542,543.

Michael was delusional upon admission. "[He felt he] doesn't have enough blood" and was hearing voices. Robots, the President and the CIA were telling him what

to do. The robots told him to kill his family. He exhibited manic behavior and pressured speech. He complained of being fed body parts and stated that if shot in the head, it would not kill him. *Id.* at admission interview.

Delusional thinking continued throughout his hospitalization. He believed his parents were still alive, that other patients wished to kill him and that a patient bit Michael's tongue. (Def.Ex.3 at progress note, December 22, 1983; progress note, December 8, 1983; progress note, November 17, 1983; R. 542,543). He explained the murders as a need to break all Ten Commandments and that this was the last commandment that "he had to break". *Id.* at progress note, November 10, 1983; psychiatric exam, October 28, 1983; progress note, October 11, 1983. Two days later Michael denied even being in Louisiana at the time of the murders. *Id.* at progress note, October 13, 1983.

The shifting nature of Michael's disease is illustrated by comparing the progress notes of November 16 and November 17, 1983. On the 16th, the note indicates no hallucinations and that he was not psychotic. The next day, Michael was seen by Dr. Jiminez and found to have shaved his eyebrows to increase the oxygen to his brain. *Id.* at progress notes, November 16, 17, 1983. On November 18th, Dr. Jiminez found him delusional and paranoid. On November 23rd, the notes indicate that his behavior was "unpredictable".

In November 1983 a psychological evaluation was completed. Dr. Curtis Vincent concluded that Perry was not malingering and that a true psychotic defect existed. His diagnosis was schizoaffective disorder. Dr. Jiminez confirmed the diagnosis of schizoaffective disorder in a January 5, 1984 progress note.

His delusional thinking does not cease even upon discharge from FFF. Dr. Jiminez noted in the final progress note that "this patient is delusional and has to be placed on medication". She further notes that because of side effects, Michael had been taken off psychotropic medications. (Def.Ex. 3 at progress note, March 16, 1984 R. 542,543).

On March 16, 1984, Dr. Jiminez found Michael still delusional but "able to give his rights as a defendant and the nature of the charges against him." *Id.* at Dr. Jiminez progress note, March 16, 1984. Michael was returned to court and found to be competent in March, 1984 (R. 8). He was tried and convicted in October, 1984. After conviction and upon being sentenced to death, he was sent to Louisiana State Penitentiary on December 20, 1985.[1]

From the first day, the prison physicians were aware of his mental condition. He was placed on extreme watch to rule out psychosis and Haldol 5 mg was ordered three times daily. (Def.Ex.5 at inpatient medical chart; progress note December 20, 1985; R. 544,545). He was discharged from the hospital on December 24 on a dosage of Haldol 10 mg three times daily. *Id.* at Discharge summary December 24, 1985.

By December 31 he "present[ed] a picture of reactive psychosis, characterized by confused thinking, grandiose delusions of being God, . . . [and] acting out behavior. His affect was disproportionately euphoric. . . . He doesn't

---

[1] Michael's records from LSP are found at Def.Ex. 5, R. 544, 545. These records were introduced in the same order in which they were provided to counsel by LSP. Although the order is generally chronological (with the latest records at the beginning of the second volume), numerous pages are out of order.

seem to present a danger to himself or others." *Id.* at doctor's progress note December 31, 1985. He was admitted to the hospital on January 11 and Haldol 10 mg was continued three times daily. *Id.* at Doctor's progress notes, January 25, 1986.

The medication charts show that he was given Haldol 5 mg three times daily from January 29 to March 11. By February 24, he was completely silent or talked only in monosyllables. He slept in excess of twenty hours per day. *Id.* at mental health progress notes, February 24, 1986.

By April 14 he was "disoriented . . . he didn't know both his specific or general location (Camp J and [LSP]). Affect was flat . . . disclaimed hallucinations and no systematic delusions noted. Doesn't appear overtly psychotic". *Id.* at progress note April 14, 1986. However, by April 22 he was admitted to the hospital for forced medication. He showed "psychotic symptoms . . . clearly manic, marginally oriented". *Id.* at hospital summary, April 22, 1986. Haldol 10 mg twice daily was ordered. *Id.* at Doctor's order, April 24, 1986. This continued until May 1 when the dosage was changed to 10 mg three times daily. *Id.* at inpatient medical chart. He was discharged on May 6 and continued on 10 mg three times daily until June 9 when the dosage was changed to 5 mg three times daily. *Id.* at inmate medical chart. He remained on this dosage throughout June and July. *Id.* at inmate medical chart.

On July 29 the staff began monitoring him for consideration of forced medication. *Id.* at progress note, July 29, 1986. On August 12, mental health found that he "may be decompensating". *Id.* at progress notes, August 12, 1986.

On September 9-10, he was "disordered" and decompensating but "was not as yet a danger". *Id.* at progress notes, September 9, 10, 1986.

By September 11 he had decompensated: "This inmate was brought to the ER as a culmination of several weeks of decompensation. He was placed on Mild Watch last night in anticipation of a total break which appears to have now occurred. He is in my opinion presently unable to function outside a hospital setting." *Id.* at progress note, September 11, 1986. Haldol was increased to 10 mg three times daily. *Id.* at doctor's order, September 11, 1986. Although he refused medication from September 15-23, on September 20, the psychiatrist found that the "psychosis had cleared". *Id.* at progress note, September 15, 1986; doctor's notes, September 20, 1986. He was discharged on September 26 with a prescription for 10 mg Haldol three times daily for a month. *Id.* at doctor's order, September 26, 1986.

On October 4 when the mental health team attempted to interview, he "went berserk, an uncontrollable, psychotic rage state. . . . At times he was . . . disoriented as to place and person." *Id.* at progress notes, October 4, 1986. During this admission to the hospital he was "howling, laughing inappropriately. His behavior was bizarre". The doctor ordered 30 mg of long-lasting Haldol D. *Id.* at doctor's order, October 7, 1986. On October 17 he was "alert, oriented, no . . . gross mental impairment." (*Id.* at progress report, October 17, 1986 R. 544,545). He was discharged on October 20 as "stable" with a prescription of 10 mg of Haldol three times daily.

By October 27, he was hearing voices and his affect was inappropriate. Haldol 10 mg three times daily was

ordered. *Id.* at psychiatric/psychological evaluation, October 27, 1986. On October 31, he was having rapid mood swings and stated that he was facing "1000 years of real life". *Id.* at progress notes, October 31, 1986.

In January 1987 Michael was seen by the mental health team because security had reported that he was "disruptive . . . yelling and screaming". The social worker concluded that he was not actively psychotic at that time. *Id.* at progress note January 2, 1987. But on February 5, 1987 he was hospitalized as "gravely disabled". *Id.* at physician's emergency certificate February 6, 1987. He was disoriented, manic, and suicidal. He exhibited bizarre behavior, hallucinations, poor insight, and poor judgment. *Id.* at physician's emergency certificate February 6, 1987; progress notes, February 5, 1987. On February 5-6, 1987, Michael was given 300 mg of Thorazine and 50 mg of long-lasting Haldol D. *Id.* at inpatient medication record, February, 1987. Dr. Guiterrez ordered 50 mg of Haldol D to be repeated in four weeks. *Id.* at doctor's notes, February 6, 1987; management order, February 5, 1987.

On February 9 he was still decompensated but was not considered a danger. *Id.* at progress note February 9, 1987. But on February 10 he was again observed to exhibit bizarre behavior and he was talking to himself. *Id.* at progress note February 10, 1987. He remained in the hospital until February 13. In a follow-up on February 16, he was described as "apparently in good remission" with "no overt pathology". *Id.* at progress note, February 16, 1987.

This "remission" did not last. On March 4, 1987, he was "decompensating" with "manic-like behavior", "yelling, raving, incoherent . . . ". *Id.* at progress notes, March

4, 1987. Although Dr. Guiterrez had ordered 50 mg of Haldol, when the next injection was due, the dosage was increased to 100 mg to be repeated monthly for four months. *Id.* at emergency room note, March 11, 1987. On April 10, 1987, he was found to have delusions centering on Olivia Newton-John. He also "gave a very delusional story about how his parents . . . had left him $200,000.00". *Id.* at progress note, April 10, 1987.

Haldol D was given on April 13 and the oral Haldol was continued at 10 mg three times per day. *Id.* at inpatient medication record April, 1987; emergency room note. By April 15, he was "actively psychotic" and was hospitalized. *Id.* at progress notes, April 13, 1987. Haldol D was increased to 200 mg and on April 19 the oral Haldol was increased to 20 mg three times per day. *Id.* inpatient medication record, April, 1987; progress notes, April 19, 1987. During this stay he was hallucinatory and delusional, had inappropriate affect and exhibited bizarre behavior. *Id.* at progress notes, April 15-20, 1987. For example, on April 21, he "said the toilet told him it was hungry so he threw soap in it". *Id.* at management order, April 21, 1987.

April 24 he was discharged from the hospital. A follow-up on April 28 described him as hyperactive but "basically intact". *Id.* at progress notes, April 28, 1987. Michael refused medication on May 9 and 13 but he was "still basically oriented". *Id.* at progress notes, May 13, 1987. Yet on May 14 he was hospitalized with "manic-like behavior, rapid speech, elevated mood, some tangential thinking". *Id.* at progress notes. May 14, 1987. He was placed under extreme watch and in restraints until his discharge on May 18. *Id.* at management orders May 15-18, 1987.

Medication was continued through May and the order for Haldol D 100 mg was renewed for four months on June 6. *Id.* at emergency room note, June 6, 1987. By July 2 he was again exhibiting bizarre behavior, hallucinations, and heightened affect but "no . . . intervention [was] seen as needed". *Id.* at consultation, July 2, 1987. On July 2, 100 mg of Haldol D was given, along with 10 mg of Haldol twice daily. *Id.* at emergency room note, July 2, 1987. However, when Dr. Cox saw Michael on August 7 he "conclude[d] this man is psychotic and exhibits signs and symptoms of chronic schizophrenia. Believes he is God and cannot be killed by electrocution". *Id.* at consultation, August 7, 1987.

In September, Michael believed he was God, that he had killed Adam and Eve, and that he makes $20,000.00 per year. *Id.* at progress note, September 5, 1987. On September 15, Dr. Cox found he is "still psychotic . . . . I continue to doubt his competency to assist in appeals process". *Id.* at consultation, September 15, 1987. Dr. Cox renewed the July order for 100 mg Haldol D. *Id.* at consultation, September 15, 1987.

In October, he was "on Haldol 10 mg B.I.D. but he remained psychotic. Is loose, disorganized, delusional and hallucinating. Still believes he cannot be killed, stated he is a CIA agent and believes he is supernatural." *Id.* at consultation, Dr. Cox, October 28, 1987. He demanded that his foot be cut off. This demand was prompted by instructions from a worm which he swallowed as a child. *Id.* at sick call, November 5, 1987.

By November 12, he had decompensated and was hospitalized again. "[H]e appears to have been taking medication but is floridly psychotic". *Id.* at admit note, November 12, 1987. His symptoms were manic behavior,

flight of ideas, hyperactivity, and sleeplessness. *Id.* at admission report, November 12, 1987; progress notes, November 12, 1987. On November 16 he was "quiet, cooperative, alert and well oriented". He was discharged that day. *Id.* at discharge summary, November 16, 1987. On November 20 Dr. Cox reported that "Michael is in good remission and is better than I have seen him" and removed him from medication. *Id.* at progress consultation, November 20, 1987.

By November 30, he had again decompensated and was hospitalized. *Id.* at consultation, Dr. Cox, November 20, 1987. Medication was renewed on November 30 with an immediate dosage of 10 mg and continuing dosage of 10 mg twice daily. *Id.* at doctor's order, November 30, 1987. The dosage was increased to 20 mg twice daily on December 2. *Id.* at doctor's order December 2, 1987. Michael was delusional, disoriented, hallucinating, hyperactive, yelling, paranoid and impaired in memory. *Id.* at progress notes, November 30, 1987; physician's notes, November 30, 1987. He had the delusion of being haunted, the Mafia was pouring water on him, threatened to kill with thunderbolts, and repeated the familiar refrain that he is God. *Id.* at progress notes, December 3-6, 1987.

On December 23 he was reported as improved and he was discharged on December 28 on 20 mg twice daily. *Id.* at progress note, December 23, 1987; discharge summary December 28, 1987. On December 30 "security officers . . . report Perry is functioning well". *Id.* at progress report, December 30, 1987. However, the next day, he was readmitted to the hospital as "decompensated . . . delusional, confused, not oriented. *Id.* at progress note, January 1, 1988. He was walking into walls, crying, and

complaining that the devil was stabbing him with a fork. *Id.* at emergency room note December 31, 1987; progress notes January 2, 1988. Haldol 10 mg STAT and 10 mg twice daily was ordered. *Id.* at doctor's orders, December 31, 1987. This was increased to 30 mg twice daily on January 6. *Id.* at nurse's notes January 6, 1988.

He was released on this dosage on January 27 and a follow-up reported that he was aware of his execution and that death is fatal. *Id.* at consultation, Dr. Cox, January 27, 1988. Yet two days later he was hollering, delusional, and was convinced that Dr. Cox was trying to kill him. *Id.* at mental health notes January, 29, 1988.[2]

In 1987, the Louisiana Supreme Court heard Michael's case on direct appeal. While affirming the conviction and sentence, the Court encouraged the state, court, or defense counsel to inquire into Michael's current mental state and competency to be executed:

> The State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime. *State v. Allen*, 15 So.2d 870 (La. 1943). No state imposes the death penalty on the insane. *Ford v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. Counsel for the defendant may apply to the trial court for an appointment of a sanity commission to make such determination. Indeed, the allegations of

[2] The medical records from LSP end in January, 1988 as this was the point at which the prison delivered the records to the trial court for the upcoming hearing.

> mental capacity may be raised by the court or the prosecutor. La.C.Cr.P. art. 642.

(J.A. 43) (*State v. Perry*, 502 So.2d 543, 563-64 (La. 1986)).

On January 14, 1988, the trial court ordered such a hearing. The court appointed three psychiatrists[3] and a psychologist[4] to examine Michael (J.A. 46). Each expert interviewed Michael between January and April, 1988.

On April 20, 1988, the experts testified on their findings (R. 498-659). At the outset, the court stated the purpose of the hearing:

> [T]he purpose of this hearing today is that under the Supreme Court decision in this case . . . , the Louisiana Supreme Court . . . said that the State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime . . . . The Supreme Court then steered defense counsel to apply to the trial court for appointment of a sanity commission to make such a determination. (R. 500).

The court also found:

> [T]he Louisiana Supreme Court further indicated that the defendant bears the burden of proving and providing the trial court with reasonable grounds to believe he is presently insane. In order for the Court to even commence these proceedings, I am satisfied that the defendant has gone forward with that . . . (J.A. 70).

[3] Dr. Aris Cox, a board certified forensic psychiatrist and consulting psychiatrist at LSP (R. 546-549); Dr. Theresita Jimenez (R. 596-98); and Dr. Glenn Estes, a Board Certified psychiatrist in private practice (R. 636).

[4] Dr. Curtis Vincent, a clinical psychologist and former acting Chief Psychologist at FFF (R. 580-84).

The experts unanimously agreed on the diagnosis of schizoaffective disorder (R. 511, 550, 592, 639), an illness which Dr. Jiminez defined as:

> [A]n illness wherein the patient has a problem with thinking disorder and at the same time with his feeling tone or the defective [sic, affective] component. When they are in the state of acute illness they are usually very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would [be] manifesting symptoms like not wanting to sleep, not wanting to talk or having crying adversity. The problem is also that they would have some distortion in their thinking and that would be the schizophrenic component of the illness. (J.A. 70-71).

Schizoaffective disorder is a major mental illness which is incurable. Although the symptoms may get better, the illness is still there. (R. 513). This condition directly affects the patient's judgment and thinking:

> [I]f you have problems with thinking disorder there are times wherein you would not be in touch with reality when you are acutely ill, and there are times when you would feel like people are out to get you or people are out against you. And that would be the paranoid component of the illness. (R. 514)
>
> Sometimes you would think that you are somebody that you are really not. And that's like when you think you are God. (R. 514)

When Dr. Jiminez evaluated Michael on February 4, 1988, she found that:

> [H]e indicated at the first part of the interview that he didn't kill the people that were killed, that somebody else did it. At a later part of the interview he accepted that he did it because he had a lot of anger towards his mother. So the information he was giving at that point was rather inconsistent. (R. 511, 516)

> He also talked about his lawyer had not defended him very well because he was a member of the mafia. (R. 511)
>
> [He has] delusion of thinking. Sometimes, also, he rambles. His thinking is not cohesive. He would go from one topic to the other and there is very loose association. (R. 515)
>
> I indicated that at the time I examined Mr. Perry he was not competent, and I felt that he would not be able to assist his lawyer in his own defense. I also indicated that I feel that Mr. Perry will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die. (J.A. 70)

Dr. Jiminez also testified about Haldol, the drug which Michael had been given at LSP: "[Haldol is] a psychotropic medication. It's supposed to get the thinking process more delusiveness [sic], more cohesive, less paranoia, and get him to be able to concentrate and participate in the interviews, make him less paranoid." (R. 519). As to the effectiveness of Haldol in stabilizing Michael's thinking, Dr. Jiminez testified that she was concerned about Michael's ambivalence or inconsistency in his thinking:

> My apprehension with him is he does get ambivalent and he knows – he's aware that he is on death row because he's going to die. He's aware that he killed his family and he will tell you he did. But he does get very ambivalent and gets very paranoid and that's a part of his illness.
>
> . . .
>
> Q (by the State): Is there a medication that you're aware of that can eliminate ambivalence in personality?
>
> A: No. It's the extent of the ambivalence that we are concerned about. And that is a part of the illness in Schizophrenia so I thought that maybe

if he could become more stabilized then maybe there will be less ambivalence on his part.

Q: How are we to stabilize him when there are no medications that eliminate ambivalence?

A: Well, that's the problem. (J.A. 75-76)

The second psychiatrist to testify was Dr. Aris Cox, a forensic psychiatrist who consults at LSP and who has seen Michael on numerous occasions (R. 550). Based on his visit with Michael on March 3, 1988, Dr. Cox concluded:

Q. Have you formulated an opinion as to whether or not Mr. Perry is competent to be executed?

A. Well, as you and I have discussed, that is a relative thing. It has to do with the treatment Mr. Perry is receiving. I have seen him at times when I did not feel he was competent to be executed. I have seen him also at times when I thought he was competent to be executed.

Q. Is there any way to predict when he is competent?

A. When I saw him the last time which was on the 3rd of March he was on neuroleptic medication. He was about as – he was functioning about as well then as I've ever seen him function. At that time I went through the whole matter with him and he was aware of why he – of where he was, what his sentence was, what he would be executed for and was aware of the fact that he could be executed.

Q. Are there other times where you've seen him when he was not competent to be executed?

A. I have. The first time I saw him I didn't think he was competent, back in July.

Q. Any other times since then?

A. Yes, sir. (J.A. 78-79).

. . .

Q. . . . [I]t appears to me that Mr. Perry is hospitalized quite frequently. Why is that?

A. He becomes psychotic and is hospitalized by the staff there so he can be given medication and treatment.

Q. When he becomes psychotic is he in contact with reality?

A. In my opinion, no, sir.

Q. Is he competent to be executed during those periods?

A. No, sir. (J.A. 80)

. . .

Q. Doctor, out in the hall you indicated that Michael was, quote, at best a moving target. Would you explain to the court what you meant by that?

A. I have seen him on and off medication several times now and I have seen him respond to medication. . . . He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. (J.A. 81-82).

. . .

Q. Doctor, you've also, I believe, seen him when he's undergone this forced treatment, have you not?

A. Yes, sir.

Q. And even after the forced treatment and massive doses of Haldol and he's still floridly psychotic?

A. He gets better. . . . He does respond to medication when he's given it and he gets better. How good he gets probably does leave something to be desired but he gets better.

. . .

I don't think I've seen Michael, even on medication, be completely coherent, well integrated,

rational. I've always felt in him there's areas of psychotic thinking there.

Q. Even on his best days?

A. Yes, sir, even when I have seen him on his best days.

Q. With massive doses of medication?

A. Yes, sir. (J.A. 83-84)

Two days after Dr. Cox saw Michael, Dr. Vincent interviewed him. His conclusion was that Michael was psychotic and not competent to be executed (J.A. 89). Dr. Vincent found Michael "[V]ery tangential with me, that is, that I asked him questions he would initially typically respond to that question very quickly, slight off the subject, and talked about something completely irrelevant." (R. 590-91). He was delusional, said he was God and had problems with his contact with reality and his consistency. (R. 619). "[H]e was very inconsistent in a number of areas but in particular regarding his actions at the time of the murders. . . . And that was very inconsistent. He was also very tangential, he had some difficulty paying attention. . . ." (R. 629). Dr. Vincent agreed that Michael is a "moving target". (R. 594).

Regarding Michael's understanding of his sentence:

Q: (By the court): In March when you interviewed him did you have occasion to discuss with him the death sentence, the electric chair? . . . What is – or was his understanding of that at that time?

A. . . . I asked him directly what happens if all the doctors go to court to the hearing and the judge finds him competent to proceed, and he indicated at that point that he would be executed. So there was some understanding that if he's found competent to proceed that he would be executed.

Q. And he knows what that means? He knows what execution is? . . .

A. Yes, he expressed some fear of dying in relationship to that.

Q. Now in your discussions did he appear to understand the reason that he was going to be executed?

A. That's a much more difficult issue. I think he has the understanding that if an individual murders somebody and they can be found guilty and then could be executed legally. . . . I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

Q. Did he acknowledge that he committed these murders to you or did he deny it?

A. He did both. At one point he admitted that he committed the murders. . . . Two minutes later I was asking another question and he said that he felt that he could be found innocent because he was in Washington D.C. at the time. (R. 623)

The final expert, Dr. Estes, interviewed Michael on March 9, 1988 and described him as:

His symptoms included disruptive behavior, physical activity, restlessness, interrupting and ignoring questions, indirectness and irrelevancy in his answers, inconsistency in his explanations, tendency to be disorganized when he presented facts, difficulties in presenting facts in chronological order, variations in the pace of his speech, jumping from one topic to another in his ideas, inappropriate moods, indication of having his thoughts broadcast out loud, indication of hallucination of voices, saying that he was God, failure to consistently recognize whether or not he was mentally ill, tendency not to acknowledge responsibility or his role in determining the actions of others toward him. (J.A. 95).

From these observations, Dr. Estes concluded:

> It's my opinion that he was not completely aware of the nature of the proceedings against him even though he was able to acknowledge that he was on death row when I saw him, and at that time he was able to say that they want me dead, but I did not conclude that he understood his sentence, his punishment for what he did was wrong.
>
> Q. What about the finality of a death sentence . . . ?
>
> A. . . . [H]e failed to acknowledge that because on some occasions when I was talking to him when I saw him he referred to his eventual release from prison. I'm not sure of what the basis of that was but he referred to it as a future event. (J.A. 93)

In addition to the experts' testimony, Michael testified (R. 962-88) and a videotape of his testimony is in evidence (attached as an exhibit to petitioner's application for writ of certiorari filed July 13, 1989). After this evidence and the introduction of Michael's medical records, the defense rested. The State also rested after presenting no evidence or witnesses (J.A. 97). The court set the ruling for May 26, 1988 (R. 692). This date was later changed to August 26, 1988 (J.A. 48)

Between April and August, 1988, the State began supplying the trial court with reports about Michael. The impetus for these reports is not clear. However, defense counsel was not informed of or copied on these transmittals. These reports consist of a page from Michael's medical records (J.A. 104-05), a handwritten note (J.A. 106), and opinions from state employees who had not been called as witnesses in April 1988 (J.A. 100-02).

On August 26, 1988, the Trial Court introduced these *ex parte* reports into the record over objection of defense counsel, stating:

> Those reports were filed at my request, or sent to this Court by my request. The defense counsels' objection to the Court reviewing these documents is overruled and the Court will file those documents into the records. And the Court has considered those reports. . . .
>
> [B]ased on the weekly reports that I have received, I feel that there has probably been a change in the mental condition of the defendant, I am ordering Drs. Cox and Jiminez to re-examine the defendant relative to his competency as set by the Louisiana Supreme Court in the original Michael Owen Perry decision. (R. 698-700)

The court then set a hearing for September 30, 1988 and "Pending that hearing, pursuant to R.S. 15:830.1, the Court is ordering that the Department of Public Safety and Corrections provide treatment and medication to the defendant as to be determined by the medical staff of the Department of Public Safety and Corrections." (R. 701). "I want it [forcible medication] done until at least September the 30th . . . when I will make a final determination on the issues." (R. 702). The court also prohibited the filing of any further briefs except to cite new cases that might be published between August and the September hearing. (R. 702).

Defense counsel objected to introduction of the weekly reports, to the order to forcibly medicate Michael, and to the lack of a hearing on the issue of medication. Counsel also sought a stay of the medication order. All of these were denied. (R. 703).

Michael sought writs of certiorari to the Louisiana Supreme Court. The Supreme Court stayed the medication order (R. 305). However, Michael was medicated on September 3, 1988 (R. 741).

On September 30, 1988, the trial court called as its witness Dr. Kay Kovac, a family practitioner who is the Medical Director of LSP. Dr. Kovac had talked to Michael for about ten to fifteen minutes on September 26, 1988. (R. 741). She described him as appropriate and not delusional (R. 718) although he did say that he occasionally heard voices. (R. 717). Because her job is primarily an administrative one, Dr. Kovac has not seen Michael frequently (R. 723). She was aware of the existence of antipsychotic medication but, because she is not a psychiatrist, had no in-depth knowledge of whether these would work for Michael (R. 718).

Dr. Cox also testified about an interview he had with Michael on September 7, 1988. Michael had been in the hospital on the weekend prior to that interview and had received an injection of Haldol (R. 737). Even with this injection, Dr. Cox found:

> Basically, I found that Mr. Perry was worse than he had been the last time I saw him. He indicated to me that he had been having hallucinations, voices, as he described it, over the weekend which had bothered him and that caused him to create outbursts that led him to go into the hospital. . . .His thought processes were disorganized. He indicated to me that he was still hallucinating. *My conclusion was that he was getting worse, even on the medication.* And I suggested to the staff that the dosage of medication would have to be increased. It was my impression, however, that he was aware of the fact that he was under a sentence of death, that the process of electrocution could kill him and

> that he was aware of why he was on death row. As far as the issue of being able to participate meaningfully in legal proceedings, testify, help an attorney, make rational decisions, basically the *Bennett* criteria as outlined in the Louisiana Supreme Court decision, I did not feel he was competent under those standards for legal participation. (J.A. 115-16) (Emphasis added)

Dr. Cox believed that his "moving target" description of Michael's competence was still viable (J.A. 116).

Dr. Jiminez was not available to testify in September but she was called on October 21, 1988. She saw Michael on September 13 and 26. (R. 752). She found him "pretty stable" (R. 753-54). He stated that he was aware of the crime and the death penalty (R. 754). However, Dr. Jiminez acknowledged that this stability was solely the result of the Haldol (R. 761).

Immediately following Dr. Jiminez's testimony, the court rendered its order:

> [I]t is obvious to this Court that the defendant is competent for execution. It is further obvious from the testimony that he is competent only when maintained on psychotropic medication in the form of Haldol. (J.A. 145)
>
> . . .
>
> [M]ichael Owen Perry[] is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer and is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [*sic*] or antipsychotic drugs, it is further ordered that the Louisiana Department of Public Safety and Corrections is to maintain the defendant on this medication as to be prescribed by the medical staff of said Department, and, if necessary, to administer said medication forcibly to defendant and over his objection. (J.A. 147)

Michael Perry then sought writs of certiorari and alternatively, an appeal to the Louisiana Supreme Court. Review was denied on May 12, 1989 (J.A. 150). Rehearing was denied on June 16, 1989 (J.A. 151). Michael Perry then sought writs of certiorari to this Honorable Court. His application was granted on March 5, 1990 and is reported at 110 S.Ct. 1317 (1990).

SUMMARY OF ARGUMENT

1. The medication which the trial court ordered for Michael Perry is not treatment; it is a step toward his execution and part of his punishment.

2. The doctors at Louisiana State Penitentiary have been treating Michael Perry for years. This order to forcibly medicate Michael goes beyond the treatment that has been administered in the past and permits no exercise of professional medical judgment.

3. Michael Perry has a history of developing side effects as a reaction to psychotropic medication. This order does not consider potential side effects or permit termination of the medication if side effects develop.

4. Michael Perry has received psychotropic medication in the past. This medication has not been successful in achieving sustained or predictable competency. Yet the order does not permit termination of the medication even if it does not work.

5. The Eighth Amendment and contemporary standards of human decency prohibit the use of forced medication solely to create competency to be executed.

6. Louisiana has no statute, case law or policy permitting the use of forced medication to create competency to be executed. Neither the Legislature nor the Supreme

Court of Louisiana has authorized the type of order which the trial court has entered for Michael.

7. No state executes the insane. The majority of states commit an insane inmate for *treatment*. The majority of states place limits on the use of forcible medication and medication for non-treatment purpose. This consensus shows that the trial court's order to forcibly medicate to create competency for execution violates the Eighth Amendment.

8. Louisiana law prohibits the execution of the insane and requires that insane inmates be *treated*. Louisiana law also defines the conditions under which an inmate can be forcibly medicated. These laws create expectations which are protected by the Due Process Clause of the Fourteenth Amendment. By ordering Michael Perry medicated for non-treatment purposes, the trial court has violated Michael Perry's rights under the Due Process Clause.

9. The trial court's order to forcibly medicate Michael considered only the State's interest in carrying out its sentence. It did not balance this interest against Michael Perry's interest in avoiding the non-consensual administration of psychotropic drugs. This order, therefore, fails to accord Michael Perry the minimal protections guaranteed by the Fourteenth Amendment.

10. The process by which the trial court reached its decision violates the Sixth and Fourteenth Amendments. Louisiana law requires that competency must be determined by a contradictory hearing. Since the court received and relied upon *ex parte* opinion and hearsay evidence which lacks any indicia of reliability, Michael's right to confrontation and cross-examination was denied.

11. Justice Powell's concurrence in *Ford v. Wainwright*, 477 U.S. 399 (1986) suggested two factors to be considered in determining competency for execution: awareness of the punishment and awareness of the reasons why punishment is to be suffered. These factors are necessary but do not provide a sufficient test. The test of competency to be executed should also include a requirement that the record demonstrate stable and predictable competency, not merely fleeting glimpses of comprehension. The trial court did not consider this factor nor does the record in this case reflect any stable and predictable competency.

12. A standard for competency should also consider the inmate's ability to assist counsel when the inmate has post-conviction remedies still available to him. Louisiana law recognizes the ability to assist counsel as a factor in determining competency. Although there was evidence that Michael is not able to assist counsel, the trial court failed to consider this element in evaluating Michael Perry's current condition.

13. Under any standard of competency, Michael Perry is incompetent. He suffers from schizoaffective disorder, a major mental illness that affects his judgment and thinking abilities. Even on medication, he frequently decompensates into psychosis that is so severe that he must be hospitalized. He is a "moving target" who has never had a sustained period of stable competence. His appreciation of the crime of which he is accused, of the fact that he has been convicted and sentenced, and of his punishment is fleeting and unpredictable. The Eighth Amendment prohibits the execution of an inmate with this limited, transitory comprehension.

ARGUMENT

I. THE ORDER TO FORCIBLY INJECT MICHAEL PERRY WITH PSYCHOTROPIC DRUGS, SOLELY IN AN EFFORT TO MAKE HIM SANE ENOUGH TO BE EXECUTED, VIOLATES THE EIGHTH AMENDMENT.

A. THE ORDER WAS NOT ENTERED TO PROVIDE TREATMENT FOR MICHAEL AND IT TAKES NO ACCOUNT OF MICHAEL'S MEDICAL NEEDS.

The testimony and medical records are quoted at length in the Statement of the Case in order to put the trial court's order in context. *Treatment* was not the issue before the court. The issue was whether Michael is currently sane enough to be executed (J.A. 46). The physicians were not appointed to develop a treatment plan for Michael and they did not testify about what they would do to treat him[5] The Department of Public Safety and Corrections was not seeking an order, under La. Rev. Stat. Ann. 15:830 and 830.1, to treat or forcibly medicate Michael to protect him or others from harm or to provide for his medical welfare. The prison doctors *had been* treating him and the treatment included psychotropic drugs when these were medically indicated.

Yet what resulted from this hearing was an order that places Michael on medication and keeps him on medication, forcibly if necessary, solely to create competency to be executed. The order makes no pretense that it is for treatment; it gives no consideration to Michael's treatment needs or his interests in avoiding forcible medication.

---

[5] *See* for example, testimony of Dr. Estes – "I don't feel prepared to recommend a course of treatment" (J.A. 94).

The purely legal, non-medical basis for this order is apparent when it is viewed against the background of what the physicians at LSP had been doing for Michael. The doctors at LSP have not been "deliberately indifferent" to Michael's medical needs. What they have been doing since 1985 is *treating* Michael and dealing with his mental problems in a way that *they* believe is medically appropriate. Michael has been receiving long lasting Haldol with supplemental oral or injectable doses. The medication ordered for Michael prior to the emergence of the present competency issue was to minimize decompensation and to provide some symptomatic relief, in accordance with professional medical judgment.

The order does not direct the doctors to simply continue treating Michael as they see fit. The judge has overridden the doctors' judgment, has substituted his own "prescription" and has relegated the doctors to the status of technicians whose purpose is to do whatever is necessary to groom Michael for execution. The order does not permit or even acknowledge the exercise of professional judgment. Although the order says that the drugs are to be "prescribed" by a doctor, the doctors are not given any latitude to design treatment goals or programs. They *must* medicate. They are not authorized to change the order or terminate medication even if professional judgment advises that they do so. An additional sign that this order is punishment, not treatment, comes from the testimony of Dr. Cox and Dr. Vincent. Both of these experts testified that they have ethical reservations about medicating a patient to create competency for execution.

> Q: [to Dr. Cox]: . . . [D]o you have an opinion on the medication of a person who suffers from a mental illness in order to make him competent to be executed ultimately?

> A: Do I have an opinion as to whether it's appropriate?
>
> Q: [S]eeing that you're in both fields of medicine and law, do you perceive dilemma from either standpoint ethically, morally or otherwise?
>
> A.: I certainly do . . . Ethically, I certainly have problems with giving somebody a medication so they will get better and can be executed. That, to me, presents kind of a catch twenty-two problem. So I think certainly that, yes, there are real problems to me. (R. 569-70).
>
> . . .
>
> Q. [to Dr. Vincent]: Do you have any ethical dilemmas or moral dilemmas presented by treating such a person to make him competent to sit in the electric chair?
>
> A. Very, very touchy issue, it's a very difficult issue.
>
> . . .
>
> I have no problems in determining if I found him to be competent to proceed in finding him competent to proceed or if I found him not competent to say that he's not competent. (R. 616)
>
> . . .
>
> I have some discomfort if I were to treat Mr. Perry to become competent to proceed. . . . [H]elping an individual so that he would become mentally healthy or healthier just so that he would be executed, I have a little bit of uneasiness about that. (R. 617)

In spite of this testimony, the order gives no consideration to medical ethics, to the Hippocratic Oath or to the physicians' guiding principle of "first do no harm".

Because the order is not keyed to Michael's well-being, it contains no limiting principle to take account of the painful, debilitating, and humiliating side effects that

may accompany psychotropic medication. It permits no abatement of the medication even if Michael develops side effects, as he has in the past. There are no time limits; there is no further review. The order is simply to medicate often enough, strongly enough, using whatever combination of drugs is necessary to attempt to achieve competence for execution and to keep doing so indefinitely.

The trial court made no finding as to how these drugs might harm Michael, how Michael might tolerate these drugs or how he might respond. When the State attempted to question the experts on this point, the court emphatically halted that line of questioning:

> Q. (By the State to Dr. Estes) . . . Can you treat a man to make him sane so he can be executed?
>
> (By the court) That's not the issue before me today, Mr. Salomon. I'm not going to make him answer the question. The inquiry today is competency to be executed. (R. 644).

Medication was never placed at issue until the trial court decided to force medication. No opportunity to litigate the propriety of the proposed medication was given. No chance to be heard or to assert countervailing interests was allowed. At the August 21 hearing when forced medication was first ordered, the court prohibited further briefing (R. 702).

The distinction between treatment and the nature of the order in this case can be summed up in one phrase: "the patient's best interests". Medicine has at its very roots the relief of human suffering and the desire to effect a cure. Even if the trial court's order were to achieve its objective, Michael would nevertheless go to his death with *his underlying mental illness*. All that this order does

is to attempt to eliminate the bar erected against Michael's execution by *Ford* and thereby permit the State to have " . . . [its] judgment [of death] made executory" (J.A. 146). Truly, this reason for medication makes the use of medicine an adjunct to electrocution, not part of the traditional pharmacopeia of the practice of medicine.

The court's order simply declares that "Louisiana's interest in the execution of that jury's verdict override [sic] . . . [the] rights of Mr. Perry." (J.A. 146). It undertakes no inquiry as to whether significant side effects are to be expected or the nature of the harm that could be caused by those side effects. Surely, if Michael is to retain any residue of his status as a human being, the types and extent of the side effects caused by this "judicial prescription" require some sort of inquiry.

Psychotropic drugs affect a patient's thinking processes and ability to communicate. Injection of psychotropic medication represents a "substantial interference with that person's liberty. *Cf. Winston v. Lee*, 470 U.S. 753 (1985); *Schmerber v. California*, 384 U.S. 757, 772 (1966)." *Washington v. Harper*, 110 S.Ct. 1028 at 1041 (1990). The decision to take such drugs implicates a person's constitutional right to make intimate decisions which fundamentally affect his interests. *Rennie v. Klein*, 653 F.2d 836, 844-45 (3d Cir. 1981); *Davis v. Hubbard*, 506 F. Supp 915, 929-30 (N.D. Ohio 1980).

Psychotropic drugs also have a significant potential for causing side effects. *Harper*, 110 S.Ct. 1028 at 1041 (1990) described these effects as "serious, even fatal". The Physicians' Desk Reference lists the recognized side effects of Haldol as including extrapyramidal syndrome

("EPS"),[6] tardive dyskinesia,[7] tardive dystonia, insomnia, restlessness, anxiety, euphoria, agitation, drowsiness, depression, lethargy, headache, confusion, vertigo, grand mal seizures, neuroleptic malignant syndrome,[8] impaired liver function, anorexia, dry mouth, blurred vision, and cataracts. Dr. Cox testified that these side effects are believed to be the result of neurological or brain damage (R. 574) and, with continued administration of the drugs, a patient has a twenty to twenty-five percent chance of developing such symptoms (R. 574-75).

For Michael the possibility of experiencing these side effects is very real because he has actually suffered such side effects in the past (R. 527, 552-3). As Dr. Jiminez testified:

> At one time he was also tried on lithium carbonate but he did not do too well and he developed too many side effects so that was discontinued. (R. 519)

---

[6] "Including Parkinson-like symptoms which . . . were usually mild to moderately severe and usually reversible. Other types of neuromuscular reactions . . . have been reported far less frequently, but were often more severe. Severe extrapyramidal reactions have been reported to occur at relatively low doses."

[7] "A syndrome consisting of potentially irreversible, involuntary, dyskinetic movements may appear in some patients on long-term therapy. . . . The symptoms are persistent and in some patients appear irreversible. The syndrome is characterized by rhythmical involuntary movements of tongue, face, mouth or jaw. . . . There is no known effective treatment for tardive dyskinesia. . . . It is suggested that all antipsychotic agents be discontinued if these symptoms appear."

[8] "A potentially fatal symptom complex . . . [with] manifestations of hyperpyrexia, muscle rigidity, altered mental status . . . and autonomic instability (irregular pulse or blood pressure, tachycardia, diaphoresis and cardiac dysrhythmia)."

> [On Lithium carbonate he] developed some gastrointestinal problems which is usually common in people taking lithium so it was discontinued. (R. 519)
>
> . . .
>
> [On Haldol at FFF] he had a very poor tolerance for medication, he developed a lot of side effects. He became very stiff and he would also have some drooling, some of which he exaggerated himself. (J.A. 72)

Illustrative of Michael's poor tolerance for psychotropic medications is the EPS suffered while awaiting trial. The progress notes of November 26, 1983 indicate: "[Michael] does appear slightly stiff – possible EPS. Takes short shuffling steps . . . " (Def.Ex.3; R. 542,543). Serious symptoms appeared on December 15, 1983. He had problems getting out of bed, appeared stiff and "unable to do anything for himself." *Id.* at progress note of December 15, 1983. By January 7, 1984, the diagnosis of EPS was made. *Id.* at progress note of January 7, 1984. On January 9, 1983, Michael's symptoms became more pronounced: "[He] was walking down the hallway, staggering and drooling at the mouth. [He] has a look and walk like he is in a zombie state." *Id.* at progress note of January 9, 1983. Dr. Vargas examined Michael for possible EPS and found shuffling gait, stiffness, increased muscle tone and increased "DTR's". On January 14, Michael was again walking with a shuffling gait. The excessive drooling had resumed. *Id.* at progress note of January 14, 1984.

The next morning Michael fell down the stairway. He was found to have urinated on himself, was almost unable to walk, was still drooling, had a shuffling gait and some movements of his tongue. The doctor noted that although Michael might be exaggerating EPS, "I believe that he does have objective signs of EPS." *Id.* When he

was brought to sick bay the next morning, he had muscular rigidity, was drooling and he had to be held to prevent his falling. His speech was slurred. Dr. Vargas found dehydration, malnourishment, neuromuscular and cardiovascular abnormalities.

Michael was evaluated by Dr. Franklin, a neuropsychiatrist, on January 27, 1984. Examination findings were "underlying psychosis" with Michael's mental status having markedly deteriorated over the previous month. Rigidity and mental confusion were also found. Michael had marked weight loss, difficulties with gait and an urinary tract infection. Gait was described as having a narrow base with an atypical shuffling gait. The diagnosis was "organic encephalopathy of unknown etiology with evidence of extrapyramidal side effects probably secondary to Prolixin." Dr. Franklin began a course of medication to "try to reverse what appears to be extrapyramidal side effects" and felt that Michael should be sent to a general hospital for full evaluation. *Id.* at consultant examination of January 27, 1984. Michael was hospitalized at Charity Hospital in New Orleans from February 3 through February 8, 1984. On his return to FFF, Dr. Jiminez stated that "This patient had been taken off psychotropic medication because he developed side effects." *Id.* at Dr. Jiminez progress note of March 16, 1984.

Side effects are not speculation with Michael Perry. The question then posed is: Can medication, *which is known to cause severe side effects in this patient*, be given without crossing the Eighth Amendment line? What is being ordered for Michael is not wellness, but exposure to severe, debilitating and humiliating side effects. The specter of dragging an insane inmate to his death was raised in *Ford* and found to be unacceptable to a civilized

society. Can it be any more "civilized" to take a drooling, incontinent, tremulous Michael to the execution chamber?

Furthermore, the medication simply does not achieve the result that the trial court desires. In the years that Michael has been at LSP, he has been medicated extensively. Yet the records, as well as the testimony at the April and September hearings, show that even with massive doses, Michael's competency remains ephemeral.

Under these circumstances, this order is not for treatment. It cannot even be pretended that an order which has no limits, which is not governed by any consideration of the patient's well-being, which allows no exercise of professional judgment and which permits no variance based on the efficacy of the medication is in the remotest sense medical treatment. The order is nothing other than a step toward Michael's execution and thus a part of his punishment (*See, Medley, Petitioner*, 134 U.S. 160, 170-71 (1890)).

The order in effect turns *Ford v. Wainwright*, 477 U.S. 399 (1986) and the Eighth Amendment against Michael. Rather than being protected from execution because he is insane, Michael's insanity has become the justification through which new punishments have become permissible. *Because* Michael is insane, the State is now able to inject him with unlimited dosages of drugs, for an unlimited time, with uncertain outcome.

The use of psychotropic drugs for purposes inimical to treatment has been described as "Orwellian." *See, Large v. Superior Court*, 714 P.2d 399 at 409 (Ariz., 1986). "Orwellian" is indeed an apt adjective to describe what has happened to Michael and what will continue to happen

under this judicial prescription. What the court has ordered here is a prescription which the Eighth Amendment forbids.

B. THE ORDER TO FORCIBLY MEDICATE MICHAEL VIOLATES THE FUNDAMENTAL RESPECT FOR HUMANITY UNDERLYING THE EIGHTH AMENDMENT.

The justification given by the trial court for this order of forcible medication is that:

> The citizens of the State of Louisiana through their Legislature have enacted the death penalty for certain crimes. The citizens of Louisiana heard this case through the jury. Mr. Perry is no longer a person surrounded with the veil of the presumption of innocence. He has been found guilty by a jury of his peers and has been sentenced by them accordingly to suffer the ultimate punishment.
>
> And it is felt by this Court that Louisiana's interest in the execution of that jury's verdict override those rights of Mr. Perry. The State is entitled to have that judgment made executory. To allow Mr. Perry to have the authority to make this decision and to refuse treatment and thereby become incompetent would allow total usurpation of the criminal laws in this area, which were enacted by the State of Louisiana. (J.A. 146).

What the court fails to acknowledge is that, even when a death sentence has been imposed, there are still limits on the state's power to carry out that sentence. A state's power must "be exercised within the limits of civilized standards" *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) citing *Trop v. Dulles*, 356 U.S. 86 at 101 (1958).

In deciding whether those standards have been violated in Michael's case, it is important to note that this order is the product of penological policy-making by a single trial judge. The only official organ of the State which has decided that "Louisiana's interest in the execution of that jury's verdict override [sic] those rights of Mr. Perry" (J.A. 146) is this trial court. The Louisiana Legislature has conspicuously *not* adopted the policy favored by Michael's trial judge: forced medication to produce synthetic competence to be executed. To the contrary, as shown in Part II, the order arbitrarily disregards the whole fabric of pertinent state statutory law which prohibits the use of medication for non-treatment purposes.

Nor has the Louisiana Supreme Court approved this choice. It merely declined to review the order, 4 votes to 3, without opinion. Thus, the ruling that the "State is entitled to have . . . [a death sentence] made executory" and to use forcible medication to achieve that end is not a position that has commended itself to any authoritative lawmaking agency of the State of Louisiana. These points are constitutionally significant for two reasons.

First, Michael is not being drugged and executed pursuant to a consistent, identifiable state policy. Michael is to be medicated solely on the basis of a ruling that is the law of no case but his own. Because this order lacks an authoritative basis in statutory law and lacks the imprimatur of a considered judgment from the Louisiana Supreme Court, Louisiana trial judges in similar cases might or might not subscribe to the same policy judgment. Thus in the administration of Louisiana's death penalty, there is now "a substantial risk that the punishment [of death] will be inflicted in an arbitrary and

capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980).

Second, the order to medicate Michael to groom him for execution does not come before this Court armored with the kind of credentials that entitle it to deference as an expression of policy from the Legislature or the State's highest court. Rather, it is the type of isolated judicial decision, unsupported by legislative authorization, that the Eighth Amendment was written principally to control.

The "limits of civilized standards" that mark the boundaries of allowable punishment under the Eighth Amendment are gauged by a familiar methodology. The Court has recognized that the meaning of the Eighth Amendment "is not fastened to the obsolete," *Weems v. United States*, 217 U.S. 349, 378 (1910), but " 'must [be] drawn[n] . . . from the evolving standards of decency that mark the progress of a maturing society,' " *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The analysis of a particular punishment in light of "evolving standards of decency" involves two inquiries. First, the Court examines contemporary standards of decency by focusing upon "objective indicia that reflect the public attitude toward a given sanction," *Gregg v. Georgia*, 428 U.S. at 173, including "the historical development of the punishment at issue, legislative judgments, and the sentencing decisions juries have made." *Enmund v. Florida*, 458 U.S. 782, 788 (1983). Second, "informed by [these] objective factors," *Coker v. Georgia*, 433 U.S. 582, 592 (1977), the Court "bring[s] its own judgment to bear on the matter," *Enmund v. Florida*, 458 U.S. at 788-89, to determine whether the sanction "comports with the basic concept of human dignity at the core of the

Amendment." *Gregg v. Georgia*, 428 U.S. 182. The additional punishment inflicted upon Michael under the trial court's order flouts the evolving standards of decency under both of these measures.

In *Ford v. Wainwright*, 477 U.S. 410 (1986), the Court examined the States' legislative enactments concerning the execution of incompetent prisoners. Finding that the States unanimously rejected execution of the insane, the Court concluded that this consensus established that contemporary standards of decency were offended by such a punishment.

> [T]he intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.

Ford, 477 U.S. at 409-10. This same analysis mandates the conclusion that using medication solely for purposes of grooming an inmate for execution is prohibited by the Eighth Amendment.

The Appendix to this brief contains a survey of state statutes providing for involuntary medication of prisoners, the procedures for dealing with insane inmates, and the limitations imposed on forcible medication. As the *Ford* Court observed, all states which have the death penalty prohibit execution when the condemned prisoner is incompetent. Of these States, thirty (30) commit the defendant civilly for *treatment*. One automatically commutes the sentence to life imprisonment.

At least twenty-five (25) States prohibit forcible treatment of incompetent persons absent a *medical* emergency

or prohibit the use of medication for nonmedical purposes. Thirteen (13) other States prohibit the use of extreme treatments such as lobotomies.[9] [10]

No state has passed legislation authorizing the use of medication to establish competency for execution nor is counsel aware of any case in which medication has been authorized for this purpose. Except for the order in Michael's case, Louisiana has never authorized medication to achieve competency for execution. *Ford* certainly brought to the fore the question of executing the insane. Yet in the wake of *Ford* neither Louisiana nor any other state has found it appropriate to use drugs to circumvent the prohibition against executing the insane or to carve out condemned incompetent prisoners from the general prohibition against involuntary medication for nonmedical purposes. This consensus shows that "contemporary standards of human decency" prohibit what the trial court has ordered for Michael.

II. THE MEDICATION ORDER ALSO VIOLATES MICHAEL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

How did the trial court conclude that Louisiana approves the use of drugs to create competency to be executed? There is no Louisiana statute which condones this practice. There is no decision from the Louisiana Supreme

---

[9] Psychotropic drugs have been classified as intrusive and extreme as lobotomies and electroshock surgery (*Guardianship of Roe*, 421 N.E.2d 40 at 53 (Mass. 1981)).

[10] The issue of forced medication has been poignantly and eloquently articulated in a note entitled *Medical Ethics and Competency to be Executed*, 96 Yale L.J. 167 (1986), and was also observed in a casenote, at 47 La. L. Rev. 1351, 1361 (1987).

Court authorizing it. There is not even an administrative regulation which contemplates it.

To the contrary, Louisiana's statutes on treatment of insane inmates, on forcible medication, and on the use of medication clearly forbid what the trial court has ordered. The Code of Criminal Procedure articles on incompetency provide:

> If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues.
>
> . . .
>
> (3) If . . . the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. La. Code Crim. Proc. Ann. art. 648 (1988)

Although these articles are phrased in terms of pre-trial incompetency, they have been applied to post-conviction proceedings (*see State v. Henson*, 351 So.2d 1169 (La. 1977)). They were specifically cited by the Louisiana Supreme Court in Michael's direct appeal as the framework through which to determine his competency to be executed (*State v. Perry*, 502 So.2d 543, 563-4 (La. 1987); J.A. 43-44).

Louisiana's law on forcible medication of inmates is La. Rev. Stat. Ann. 15:830.1. That statute permits forcible medication for no longer than fifteen days and then *only* when (1) the inmate is mentally ill or retarded and (2) a

physician certifies that medication is necessary to prevent harm to the inmate or others. *Id.* 15:830.1 (A). Medication beyond fifteen days is permitted *only* if (1) a petition has been filed with the court; (2) the petition sets forth reasons for the treatment; (3) there is a hearing at which the inmate has a right to counsel; and (4) the court determines that the inmate is incompetent. *Id.* If these conditions are met, the inmate is to be given "appropriate treatment" at a treatment facility. *Id.* 15:830.1 (B) in accordance with all procedures required by law for civil commitments. *Id.* 15:830.1 (C).

Louisiana law on the use of medication is La. Rev. Stat. Ann. 28:171. Section P of that statute states:

> No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient. . . .*Medication shall not be used for non-medical reasons such as punishment or for convenience of the staff.* (Emphasis added).

The theme throughout these statutes is "treatment". Treatment is the exclusive justification for forced medication. Nowhere in Louisiana law is there authorization for forcible medication for any reason other than treatment.

All of these statutes are written in mandatory language – petition *shall* be filed", "Court *shall determine* whether the inmate is competent", and if the inmate is not competent, the court "*shall* order that appropriate treatment be provided." In *Harper*, ___ U.S. ___, 110 S.Ct. 1028 at 1036, this Court recognized that an order for forced medication, written in mandatory language, creates a liberty interest protected by the Due Process Clause:

> In *Hewitt v. Helms*, 459 U.S. 460 (1983), we held that Pennsylvania had created a protected liberty interest on the part of prison inmates to avoid

> administrative segregation by enacting regulations that "used language of an unmistakably mandatory character, requiring that certain procedures "shall", "will", or "must" be employed . . . . Policy 600.30 is similarly mandatory in character. By permitting a psychiatrist to treat an inmate with psychotropic drugs against his wishes only if he is found to be (1) mentally ill and (2) gravely disabled or dangerous, the Policy creates a justifiable expectation that drugs will not be administered unless those conditions occur.

When a regulation or statute creates such expectations, the Due Process Clause "insure[s] that the state-created right is not arbitrarily abrogated." *Meachum v. Fano*, 427 U.S. 215, 227 (1976) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)). This Court need not decide whether the Fourteenth Amendment requires exactly the same statutory scheme that Louisiana has adopted. A state, by its enactments or decisional law, may create an expectation which is broader than the substantive protection provided by the United States Constitution. *Ford*, 477 U.S. at 421 n.3, (Powell, J., concurring); *Mills v. Rogers*, 457 U.S. 291, at 300 (1982).

Louisiana's statutory law and jurisprudence on medication has created expectations cognizable under the Due Process Clause. Like the policy in *Harper*, these statutes "undoubtedly confer[] upon respondent a right to be free from the arbitrary administration of antipsychotic medication." *Harper*, 110 S.Ct. at 1036. The trial court's order denies Michael the expectation that he will be medicated only in accordance with Louisiana statutory law and, thus, is a violation of Due Process.

III. THE TRIAL COURT'S ORDER FAILS TO MEET MINIMAL DUE PROCESS REQUIREMENTS.

Harper, ___ U.S. ___, 110 S.Ct. 1036-37 recognizes that an order of forced medication must be evaluated not only in light of the state's statutory scheme but also in light of the Due Process Clause:

> We have no doubt that, in addition to the liberty interest created by the State's policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. . . .

Harper, 110 S.Ct. at 1036-37.

Harper permitted this interest to be curtailed only upon a finding "that a mental disorder exists that is likely to cause harm if not treated" and "the treatment is in the inmate's medical interest" and "the drugs may be administered for no purpose other than treatment and only under the direction of a licensed psychiatrist." *Harper*, 110 S.Ct. at 1039-40. In ruling in Michael's case that the state's interest in carrying out its sentence overrides any interests that Michael has, the court failed to undertake this balancing of interests required by the Fourteenth Amendment. Obviously, a state has an interest in seeing its criminal penalties carried out. But the court's conclusion that the death penalty justifies anything and everything that happens to Michael, with no limits whatsoever, goes too far.

Louisiana has said that it will not execute Michael when he is insane (*State v. Perry*, 502 So.2d at 563-64, J.A. 43). Using forced medication solely as a means to groom Michael for execution, without in any way limiting that order or considering Michael's interests and medical needs, violates the limits set in *Harper*.

IV. THE TRIAL COURT'S FINDING OF MICHAEL'S COMPETENCY WAS MADE THROUGH PROCEDURES THAT FAILED TO AFFORD THE SAFEGUARDS REQUIRED BY THE EIGHTH AMENDMENT AND DUE PROCESS.

At the April 20, 1988 hearing, each of the experts found Michael incompetent (J.A. 63, 69, 70, 89). At that hearing the defense and the state both rested (J.A. 97-98). The court asked for briefs and set the ruling for May 26, 1988 (R. 692).

After the April 20, 1988 hearing the trial court began *ex parte* communication with the State. The information provided to the trial court was not made available to counsel for Michael. Nor were they even made aware of the existence of these communications. Counsel first became aware of these materials when the State cited a "weekly report" in its brief to the trial court *after* the April, 1988 hearing (R. 122).

Defense counsel filed a written motion (R. 194) objecting to the Court receiving or relying on any such communications, citing Michael's right of cross-examination, confrontation, basic due process and Sixth Amendment concerns. Counsel also asked for a hearing on whether this communication should be considered.

No hearing was granted and on August 26, 1988 the Court denied the written motion (J.A. 110). The court stated that it would rely upon and was considering these materials (J.A. 111). The result of the court's reliance on the uncross-examined, unsworn hearsay and opinion was a "new" hearing set by the Court on September 30, 1988. No express ruling on Michael's competency has been made from the "old" hearing.

This *ex parte* communication consists of communications with Department of Corrections' counsel and commentary on Michael's condition by Department of

Corrections personnel (J.A. 99-106). These individuals were never called to testify, were never subjected to cross-examination or to the basic rule of competency – the oath. Their reports offer opinions even though the authors were never qualified as experts; the factual foundation justifying these opinions is not given.[11]

These materials lack any indicia of reliability. For example, one of the documents is a note from a social worker who writes that she "saw [Michael] while . . . on the tier to see another inmate. He appears to be in fair remission". (J.A. 106). "Fair" as compared to what? What had she seen the day before, or week before – a decompensated, insane Michael? On what facts was this opinion based – did she interview him, do diagnostic testing, or did the author just catch a glimpse of Michael as she walked down the hall? We will never know.

A second report (J.A. 101-02) is a response by a social worker to three questions, namely Michael's condition on medication, his condition immediately after being removed from medication, and his condition after being off medication for an extended period. Unlike medical records or charts which are maintained by medical professionals in the ordinary course of diagnosis or treating a patient, this document was specially prepared for submission to the court (J.A. 101). The answers are *not* a factual synopsis from the chart; they are opinions and impressions.

---

[11] The materials included in the record may not be all of the *ex parte* communications given to the court. One item (J.A. 99) refers to "prior conversation" with the court and states that there will be more weekly reports submitted in the future.

Another excerpt consists of *one day's* nursing notes from Michael's hospital record at LSP (J.A. 104-05). Michael is constantly being hospitalized. Why pick this one day? The answer is obvious – this was an attempt to convey the impression that Michael is rational. However, the testimony from the April and September 1988 hearings shows that Michael's contact with reality varies on a daily (or less) basis. Selecting one day as a measure of Michael's condition is not a fair attempt to keep the Judge updated on Michael's condition – it is a blatant attempt to pick and choose "evidence" most beneficial to the State, outside of the ability of defense counsel to challenge the evidence and demonstrate that this is not representative of Michael's condition.

The purpose of cross-examination is to explore questions so the trier of fact can determine what weight, if any, to give to the witness' testimony. Michael was denied this opportunity because of the *ex parte* nature of these communications. As stated in *Ford*, 477 U.S. at 416:

> [C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of the truth. . . .Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the basis for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent. . . .The failure of the

> Florida procedure to afford the prisoner's representative any opportunity to clarify or challenge the state experts' opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted.

The procedural defect in Michael's case is as egregious as the defect which led this Court to find Florida's procedure inadequate. In *Ford*, defense counsel was not given an opportunity to present evidence and cross-examine the experts. In Michael's case, there was a hearing at which the State and defense questioned the members of the sanity commission. The problem is that the record was "supplemented" with *ex parte* reports and those reports obviously influenced the court's decision. The court so stated. (R. 700).

This Court has said on at least three occasions that determinations of competence must comply with minimal due process, cross-examination and confrontation. In addition to *Ford*, the Court in *Vitek v. Jones*, 445 U.S. 480 (1980) held that the transfer of an inmate for psychiatric treatment without adequate hearing and confrontation was unconstitutional. In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court reversed when the trial judge relied on a psychiatrist's report, without a hearing, in determining that a defendant should be transferred to a mental hospital. The Court found that a procedure which considered hearsay evidence and denied cross-examination and confrontation violated due process.

In addition to constitutional requirements, Louisiana has statutes which guarantee an adversarial proceeding when competence is at issue. Notice, hearing, confrontation and cross-examination are expressly a part of the Code of Criminal Procedure Articles on sanity commissions (La. Code Crim. Proc. Ann. art. 647). A hearing with

notice and representation by counsel is required by the statute on commitment of insane inmates (La. Rev. Stat. Ann. 15:830) and the statute on medication of inmates (La. Rev. Stat. Ann. 15:830.1). The statutes are couched in "language of an unmistakably mandatory character".

What is at issue is that the integrity of the factfinding process broke down. The procedure used by the trial court is contrary to Louisiana law and fails to provide the rudiments of Due Process. These deficiencies warrant the reversal of the trial court's decision.

V. THE TRIAL COURT'S FINDING OF MICHAEL'S COMPETENCY DOES NOT MEET EIGHTH AMENDMENT STANDARDS.

A. THE FINDING OF COMPETENCY DOES NOT MEET THE STANDARDS OF *FORD* BECAUSE IT DOES NOT ASSURE THAT MICHAEL WILL ACTUALLY BE COMPETENT AT THE TIME OF EXECUTION.

While concluding in *Ford* that executions of the insane are unconstitutional, this Court has not stated how competency to be executed should be defined. Justice Powell addressed this question in an often quoted concurrence:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

Ford, 477 U.S. at 422. *see also Penry v. Lynaugh*, ___ U.S.___, 109 S.Ct. 2934 (1989).

Michael Perry's case demonstrates that, while the factors listed by Justice Powell are *necessary* considerations, they do not provide a *sufficient* basis for defining competence under the Eighth Amendment. Therefore, when the trial court adopted Justice Powell's concurrence as the test for Michael's competency (J.A. 141, 145), it omitted key factors which must be considered if Michael's sentence is to be constitutionally carried out.

The first factor which was omitted is reliability. This Court has stated that the Eighth Amendment's prohibition against cruel and unusual punishment creates a special need for certainty and reliability when the death penalty is to be imposed (*Johnson v. Mississippi*, 486 U.S. 578 at 584 (1988) citing *Gardner v. Florida*, 430 U.S. 349, at 363-64 (1977), *Woodson v. North Carolina*, 428 U.S. 280, at 305 (1976). The definition of competency should thus include a requirement that the inmate's competency be stable and predictable. Otherwise, there can be no certainty that, *at the time of his execution*, the inmate is in fact competent.

Michael lacks this predictability, reliability, and stability. Dr. Cox described him as a "moving target" (J.A. 81); there is no way to predict whether any particular day will be good or bad (J.A. 79). For example, Dr. Jiminez found Michael incompetent on February 4, 1988 (J.A. 70). When Dr. Cox saw Michael on March 3, 1988, he felt that Michael was "functioning as well as [Dr. Cox] had seen him function" (J.A. 79) and that he was aware that he was to be executed. When Dr. Vincent saw him two days later, he was "floridly psychotic" and not competent to be executed (J.A. 90). The LSP records show numerous occasions when Michael was released from the hospital as "stable" or "improved" only to be readmitted within a matter of days as decompensated and psychotic.

With this instability and unpredictability, how is Michael's execution to be carried out? Can the state wait until a "good day" and execute Michael? Can Michael be executed if his "good days" outnumber his "bad days" by some amount? What amount? And what happens if the date set in the death warrant is a "bad day"?

When Dr. Cox says that Michael was doing better in March 1988, the inevitable question is "better than what"? For Michael, "better" may mean that he no longer thinks he is a CIA agent or that he has stopped feeding soap to the toilet. His competency is only "a relative thing" (J.A. 78). *Even with his medication and even on his best days*, Michael has never been completely coherent, rational and well-integrated (J.A. 83-84). When Dr. Cox saw Michael in September, 1988, he concluded that he was getting *worse* even on medication (J.A. 115-16). Dr. Jiminez described him as "ambivalent" and inconsistent in his comprehension. It is this symptom which caused her concern about his competence and this symptom cannot be cured by medication (J.A. 75-76).

A standard which defines competency as simply "doing better" is arbitrary. A standard which permits competency to be based on fleeting glimpses of insight or the ability to "mouth the right words" does not ensure the reliability that the Eighth Amendment requires. When competency lasts for only a day or two and there is no way to predict when the inmate will or will not be competent, the death penalty becomes capricious and arbitrary. It is literally a question of the executioner catching the inmate on a "good day" or else subjecting him to an execution that is unconstitutional.

A standard which permits competency to be based on fleeting glimpses of insight also encourages repetitious, last minute pleas for stays of execution. Under such a

standard a record presented to a District Court, even if it adequately reflects the prisoner's condition at a point in time, becomes inaccurate by the time the same case reaches the Court of Appeal and even more inaccurate by the time it reaches this Court. The choice then becomes either executing someone who cannot understand his punishment or inviting additional evidentiary hearings.

While Michael's condition is obviously peculiar to him, his facts show why Justice Powell's standard should be expanded. Adopting a standard which requires demonstrated stable, predictable competence allows some assurance that the record being reviewed truly reflects the inmate's condition. Such a standard would provide the degree of reliability that *Furman v. Georgia*, 408 U.S. 238 (1972) and *Woodson*, 428 U.S. 280 (1976) require.

B. THE PROPER EIGHTH AND FOURTEENTH AMENDMENT STANDARD REQUIRES CONSIDERATION OF A CONDEMNED INMATE'S CAPACITY TO CONSULT AND COOPERATE WITH COUNSEL IN PURSUING SUCH POST-CONVICTION PROCEEDINGS AS ARE NOT YET EXHAUSTED.

The second factor omitted by the trial court was a consideration of Michael's ability to assist counsel in his remaining post-conviction proceedings. The ability to assist counsel is part of Louisiana's definition of competency in Code Crim. Proc. art. 641:

> Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Per La. Code Crim. Proc. Ann. art. 642, a defendant's mental capacity to proceed may be raised at any time. Once a defendant's mental capacity to proceed is raised,

all proceedings cease until the defendant is found to have the mental capacity to go forward.

Since *State v. Allen*, 15 So.2d 870 (La. 1943), the Louisiana Supreme Court has applied this statutory scheme in the context of post-trial competence to be executed. *Allen* extends the competency-to-stand trial articles to post-conviction situations. In *Allen*, the Louisiana Supreme Court found that before a defendant will be executed, competency must be demonstrated, "[F]or the same reason that a person is entitled to a hearing before a conviction on the question of his sanity, he is entitled to a hearing after conviction; and the same rules of procedure govern." *Allen* at 871; A defendant, then, must be able to understand the nature of the proceedings, or be able to assist in his defense before Louisiana will execute him since the same rules govern.

In *State v. Perry*, 502 So.2d 543 (La. 1986), the Louisiana Supreme Court approved the application of *Allen* to post-conviction determinations of competency to be executed:

> Counsel for the defendant may apply to the trial court for appointment of a sanity commission to make such a determination. Indeed, the allegation of mental incapacity may be raised by the Court or the prosecutor. La.C.Cr.P. art. 642.
>
> If the defendant seeks a sanity commission prior to execution, he bears the burden of providing the trial court with a reasonable ground to believe he is presently insane. *State v. Allen, supra*; La.C.Cr.P. art. 642; *State v. Lowenfield, supra*. Defendant's burden is to show by a preponderance of evidence that he lacks the present capacity to undergo execution.

Perry, 502 So.2d at 564.

Perry's "present capacity to undergo execution" incorporates the standards for competency set forth in

La.Code Crim. Proc. Ann. art. 641 and elaborated upon in *State v. Bennett*, 345 So.2d 1129, 1138 (La. 1977). Since *Allen* requires a hearing on the question of competency to be executed "for the same reason" that a person is entitled to a hearing before conviction, the same factors which *Bennett* requires a Court to consider in determining competency before trial, are applicable to the post-conviction context.[12]

---

[12] To divorce competency to be executed from competency to assist counsel creates more problems. If a defendant is entitled to seek post-conviction relief, then he must be able to sufficiently review the case with his counsel so that counsel can prepare a complete and sufficient post-conviction petition. In fact, in order to ensure fairness in post-conviction capital cases, many states, Louisiana included, have sought the assistance of large civil law firms to provide representation in post-conviction death cases. Judge Rubin of the United States Court of Appeals for the Fifth Circuit stated the matter succinctly: "Why are the courts involved in this project? Because we believe that no person should be executed until he has had a fair opportunity **with the benefit of competent counsel** to have the constitutionality of his conviction and sentence reviewed." Rubin, *You Don't Have to be a Bleeding Heart: A Call For Tough Minded Lawyers Who Believe in Due Process*, 35 La. B.J. 240, 241 (1987). See also, *Criminal Law and Procedure*, 35 Loy. L. Rev. 833, 856-57 (1989). That is what happened in Michael's case. By written order of the Louisiana Supreme Court, counsel was appointed to represent him in post-conviction proceedings. The import is clear: the judiciary is seeking competent counsel to represent death row inmates in post-conviction proceedings. Notwithstanding the fact that death row inmates might understand the punishment they are to suffer and why they are to suffer it, if they are unable to assist counsel in the preparation and presentation of petitions for post-conviction relief, then a defendant's right to seek post-conviction relief in both the state and federal court systems is meaningless and violates due process since counsel was appointed by court order to assist the inmate.

Under *Bennett* the condemned person must understand the nature of the proceedings against him, i.e., understand *he* has been sentenced to death for *his* having committed the crime; and he must participate with informed appreciation in the execution of that sentence, i.e., understand the nature and finality of the death penalty. Lastly, he must be able to assist in his defense, i.e., he must be able to provide meaningful assistance in the defense of his life by understanding the proceedings.

The *Bennett* criteria are similar to Standard 7-5.6(b) of the American Bar Association's Criminal Justice Mental Health Standards on Competence and Capital Punishment which states:

> A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. *The convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the Court.* (emphasis added).

The ABA Task Force was concerned that "the integrity of the criminal justice system is eroded by the execution of a defendant who is incapable of understanding the penalty that is about to be imposed or who is unable to communicate exculpatory or mitigating information that might effect the decision regarding capital punishment." (Commentary on Rule, 7-5.6). The Task Force found "[t]he possibility that a defendant could be executed because of inability to communicate information that could be relevant to the decision whether to carry out the death sentence is equally unacceptable as executing someone who

could not understand the penalty." (Commentary on Rule, 7-5.6(b), footnote 7). Recognizing that Justice Powell's concurrence is limited, the Task Force stated that the ABA standard addresses "both ability to understand the proceedings and ability to assist counsel."

The trial court in Michael's case acknowledged *Allen* and the Code of Criminal Procedure articles (J.A. 130-31) but then ignored the very "set of statutes [it had] to work with." The trial court failed to apply that statutory scheme and its jurisprudence to the post-conviction setting as required by *Allen* and failed to inquire whether Michael has the ability to understand these proceedings.

The testimony shows that Michael does not understand fully the nature of these proceedings and cannot assist counsel in present or future representation regarding the presentation of his case, including these very proceedings. At the September hearing, Dr. Cox made that fact abundantly clear[13] as did Dr. Vincent in the April hearing.[14]

---

[13] "As far as the issue of being able to participate meaningfully in legal proceedings, testify, help an attorney, make rational decisions, basically the *Bennett* criteria as outlined in the Louisiana Supreme Court decision, I did not feel he was competent under those standards for legal participation." (J.A. 116)

[14] "As of March 5th . . . he was also very tangential, he had some difficulty paying attention and as a result I would see his having some difficulty assisting in his defense today, for instance. . . .To be able to sit in the courtroom, hear what the witness is talking about here, hear what the members of the court are talking about, critically evaluate these and give some information to his attorney as to whether that's accurate or inaccurate or whether he has some additional information that he would provide." (R. 629)

By subjecting Michael Perry's competence solely to Justice Powell's *Ford* analysis, the trial court derogated rights Michael Perry has pursuant to Louisiana statutory law. Because Louisiana law recognizes, as *Ford* said, "a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum"[15] the trial court's failure to recognize and apply those standards violates Michael Perry's Fourteenth Amendment right to Due Process. As pointed out by Justices O'Connor and White in their concurring opinion in *Ford*, when a state clearly gives certain rights to a defendant, the arbitrary failure to recognize those rights deprives the individual of Due Process. *See also Hicks v. Oklahoma*, 447 U.S. 343 (1980).

Accordingly, Michael's case clearly demonstrates an expansive view is needed and that standard of competency to be executed should encompass the ability of the condemned inmate to assist his counsel. Adding this requirement is essential because even if an inmate fleetingly understands the reason he is to be executed and that he will die, that fact does not mean that he is sane, competent, in touch with reality or able to assist counsel.

C. UNDER ANY STANDARD, MICHAEL PERRY IS INCOMPETENT TO BE EXECUTED.

Like Alvin Ford (*Ford*, 477 U.S. at 404), Michael is confused about who killed his parents, whether or not

---

[15] The Louisiana Constitution provides that [n]o law shall subject any person to . . . cruel, *excessive*, or unusual punishment." La. Const. Art. I Section 20. *See State v. Sepulvado*, 367 So.2d 762, 764-766 (La. 1979). *See also* Note, 47 *La. L. Rev.* 1351, 1359, 1364 and n. 62 (1987), supporting the position that Louisiana provides greater substantive and procedural safeguards than *Ford*.

they are even dead and why he is in prison. From day to day, Michael's grasp of reality is mercurial. Dr. Cox testified that when Michael becomes psychotic he is not competent to be executed. (R. 551). Michael has the delusion that he is God and "that he could not be killed by electrocution, that it would take several hours for the staff to figure this out and it would be a struggle but that he would prevail and he would not be executed." (R. 556A).

Also like Alvin Ford, Michael does not believe that he is to die for the murders for which he has been convicted. When the trial court asked Michael if he knew he had been brought to trial for killing five members of his family, Michael answered "I didn't do it" (R. 671). When asked if he understood that the jury had found him guilty, Michael responded "I didn't know that. They told me innocent." (R. 672).

Under Justice Powell's standard, Michael does not comprehend the nature of **his** crime or **his** punishment in any meaningful way. If the additional requirement of reliability is added to Justice Powell's standard, Michael certainly is incompetent. Michael's illness makes him a "moving target" whose competency changes frequently.

What is presented in the Statement of the Case is a picture of incurable insanity. The abhorrence that this court expressed at the execution of the insane in *Ford* should be felt no less here. The retributive value of Michael's death is undermined by his fleeting understanding of the murders, his role in them, and the penalty that has been imposed for them. Michael Owen Perry is insane and may not be executed.

CONCLUSION AND RELIEF REQUESTED

The trial court committed numerous errors of constitutional proportions. The court ignored Louisiana's statutory scheme for treating mentally ill prisoners and substituted in its place an order which finds no support in Louisiana policy or law. Considering hearsay evidence outside the record violates Michael's right to confrontation and cross-examination. Proceeding with these hearings, in the face of testimony that Michael is presently incompetent to proceed, violated La. Code Crim. Proc. Ann. art. 642, and his due process rights under the Fourteenth Amendment. Without reaching the incredibly difficult constitutional issues raised on the merits of this writ, this Court can reverse for these defects alone.

Even if these proceedings were procedurally sound, the trial court's ruling cannot stand constitutionally. Louisiana has joined the majority of states in treating – not executing – its insane inmates. The Eighth Amendment prohibits executions of the insane based on demonstrated standards of "human decency". Those same standards, as demonstrated in Louisiana and the rest of the states, condemn what the trial court has done here. Using medication as an experiment to try to achieve synthetic sanity to be executed is constitutionally offensive and simply wrong by any measure of humanity and respect for the dignity of "even" a death row inmate.

Ironically, Michael's condition and history make this case an easy one in one sense – there is no question that Michael is insane under any meaningful standard of competency. This Court need do no more than restate what has already been said in *State v. Perry* – Louisiana does not execute the insane. Then apply existing law which says that all proceedings must stop until competence is

regained – not by an experiment – but by treatment which is guided by the exercise of professional judgment and sound medical ethics. If competence can be regained by this method, then the State may be able to exact its retribution on Michael. If competence is not regained by *treatment* and Michael is not executed, that is the price that the Eighth Amendment demands to maintain our "standards of human decency".

Petitioner, Michael Owen Perry, therefore prays that the order of the trial court be reversed.

BY ATTORNEYS:

NORDYKE AND DENLINGER

KEITH B. NORDYKE
JUNE E. DENLINGER
427 Mayflower
Baton Rouge, Louisiana 70802
(504) 383-1601

McGLINCHEY, STAFFORD, CELLINI AND LANG

JOE GIARRUSSO, JR.
643 Magazine Street
New Orleans, Louisiana 70130
(504) 586-1200

CHART 1

Survey of State Statutes on Disposition of Inmates Found Incompetent to be Executed

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
ALABAMA	SUSPEND EXECUTION	ALA. CODE SEC. 15-16-23 (SUPP. 1988)	Y, STATE HOSP.
ALASKA	STAY PROCEEDINGS	SEC. 12.47.110(1984)	CUSTODY COMMISSIONER HEALTH & SOC. SERV.
ARIZONA	SUSPEND EXECUTION	A.R.S. SEC. 13-4024 (1978)	Y, STATE HOSP.
ARKANSAS	SUSPEND PROCEEDING	SEC. 5-2-31[illegible] 1987)	Y, STATE HOSP.
CALIFORNIA	SUSPEND EXECUTION	WEST'S ANN.CAL.PENAL CODE SEC. 3700.1, 3700.2 (1982)	Y, MED. FACIL. OF DEPT. OF CORR.
COLORADO	SUSPEND PROCEEDINGS	COLO.REV.STAT. SEC. 16-8-112(2) (1986)	Y

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
CONNECTICUT	STAY EXECUTION	C.G.S.A. SEC. 54-101(1988)	Y, STATE HOSP.
DELAWARE		DEL.CODE ANN., TIT.11, SEC.406(1987)	Y, TRANSFERED TO STATE HOSP.
D.C.			
FLORIDA	STAY EXECUTION	WEST'S F.S.A. SEC. 922.07(1985)	Y, DEPT.CORR.MENT. HEALTH TREAT FACIL.
GEORGIA	NO EXECUTION IF MENTALLY INCOMP.	O.C.G.A. SEC. 17-10-61 & 62(SUPP.1988)	Y, DEPT. OF HUMAN RESOURCES
HAWAII			
IDAHO	REPEALED SEC. 19-2709-2712: INQUIRY INTO DEF'S SANITY-PROC (1987)		
ILLINOIS	REMANDED TO CUSTODY	ILL.REV.STAT.1983, ch. 38, PAR. 1005-2-3(1982)	Y, DEPT.OF CORRECT.
INDIANA	PROVIDE CARE AND TREATMENT	WEST'S A.I.C. 11-10-4-2(1984)	Y, INVOL.TRANSFER TO MENT.HEALTH FACIL.

App. 2

IOWA			
KANSAS	SUSPEND EXECUTION	K.S.A. SEC. 22-4006(3)(1983)	
KENTUCKY	STAY EXECUTION	KY.REV.STAT.ANN. SEC. 431.240(BALDWIN 1985)	Y, STATE FORENSIC PSYCH.FAC.
LOUISIANA	SUSPEND PROCEEDINGS	STATE V. ALLEN, 15 So.2D 870 (La. 1943)CIVIL CODE OF CRIM. P. Art. 641 ET SEQ.	
MAINE			
MARYLAND	EXECUT. PROHIBITED IF INCOMP.	MD.ANN.CODE, ART.27, SEC. 75A(2)(b) (1985 SUPP.)	N, REMAND FOR LIFE SENTENCE
MASSACHUSETTS	STAY EXECUTION	ALM GL c279 SEC. 62 (1986)	Y, STATE HOSP.
MICHIGAN			
MINNESOTA			
MISSISSIPPI	STAY EXECUTION	MISS.CODE ANN. SEC. 99-19-57(2) (SUPP.1988)	Y, FORENSIC UNIT STATE HOSP.

App. 3

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
MISSOURI	STAY EXECUTION	V.A.M.S. SEC. 552.060(1978)	Y, HELD IN PENAL INST. SUBJ.TRANSF.MENT.HOSP.
MONTANA	SUSPEND EXECUTION	MONT.CODE ANN.SEC. 46-19-202, AND SEC. 46-14-221(1987)	Y, STATE HOSP.
NEBRASKA	SUSPEND EXECUTION	R.R.S., 1943 SEC. 29-2537(SUPP.1988)	
NEVADA	SUSPEND EXECUTION	N.R.S. SEC. 176.455(1977)	Y, DIRECT DEPT.PRISONS TO CONFINE IN SAFE PLACE
NEW HAMPSHIRE			
NEW JERSEY	DOES NOT STATE	N.J.S.A. SEC. 30:4-82 x (WEST 1981)(SUPP.1988 REPEALED)	PLAN FOR CARE IN PROGRESS
NEW MEXICO	SUSPEND EXECUTION	N.M.STAT.ANN. SEC. 31-14-7(1984)	Y, STATE HOSP.
NEW YORK	SUSPEND EXECUTION	N.Y. CORREC.LAW SEC.656 x (McKINNEY SUPP.1986)	Y, STATE HOSP.

NORTH CAROLINA	NO PERSON MAY BE TRIED, CONVICTED, OR PUNISHED IF MENTALLY ILL	N.C.GEN.STAT.SEC. 15A-1001(1983)	Y, INVOL.CIV.COMMITMT.
NORTH DAKOTA			
OHIO	SUSPEND EXECUTION	OHIO REV.CODE ANN. SEC. 2949.29	
OKLAHOMA	SUSPEND EXECUTION	X 22 OKL.ST.ANN.SEC. 1008(1986)	Y, STATE HOSP.
OREGON			
PENNSYLVANIA			
RHODE ISLAND	CONFINEMENT	R.I.GEN.LAWS SEC. 40.1-5.3-7	Y, STATE MENT.HOSP.
SOUTH CAROLINA	CONFINEMENT	S.C.CODE SEC. 44-23-220(1985)	Y, MENT.HEALTH FAC.
SOUTH DAKOTA	SUSPEND EXECUTION	SDCL TITLE 23A-27A-24(1979)	Y, HUMAN SERVICES CENTER
TENNESSEE			
TEXAS	HOSPITALIZED	TEX.CODE CRIM. PROC.CODE ANN., ART. 46.01(1979)	Y, CIV.COMMITMENT MAX.SECURITY

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
UTAH	STAY EXECUTION	UTAH CODE ANN.SEC. 77-19-13(SUPP.1988)	Y, COMMITMENT
VERMONT			
VIRGINIA	HOSPITALIZED	VA.CODE SEC. 19.2-111(1983)	Y, DESIGNATED FACILITY
WASHINGTON			
WEST VIRGINIA			
WISCONSIN			
WYOMING	SUSPEND EXECUTION	WYO.STAT.SEC. 7-13-901-903 (SUPP.1985)	Y, FAC.TO STUDY MENT.CONDITION/30 DAYS

CHART 2

Survey of State Statutes on Forcible Medication and Experimental Medication

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
ALABAMA	N				
ALASKA	Y	RT. TO BE FREE FROM-- UNNEC., EXCESSIVE MED.	SEC. 47.30.825 (1984)	PROHIBITED	SEC. 47.30.830 (1984)
ARIZONA	Y	CONSENT NEEDED	A.R.S. SEC. 36-513 (1978)	PROHIBITED	A.R.S. SEC. 36-561 (1978)
ARKANSAS	N				
CALIFORNIA	Y	RT.TO REFUSE CONVULSIVE TREAT.	WEST'S ANN. CA. WELF. & INST.CODE SEC. 5325(1982)	CONSENT FOR CONVUL. TREAT.	WEST'S ANN. CA. WELF. & INST.CODE SEC. 5325 (1982)

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
CONNECTICUT	Y	NO CONSENT NEEDED U/L SURGERY	C.G.S.A. SEC. 17-206d(1988)	CAN'T BE USED AS SUBSTITUTE FOR HABILITATION	C.G.S.A. SEC. 17-206-e (1988)
DELAWARE	Y	CONSENT FOR SURG., SHOCK,MAJ. MED.	DEL.CODE ANN., TIT.16, SEC. 5161(SUPP.1988)	NEED WRITTEN CONSENT FOR MENTAL HOSP.PATIENT	DEL.CODE ANN., TIT. 16, SEC. 5161 (SUPP.1988)
D.C.	Y	RT.TO BE FREE FROM UNNEC., EXCESSIVE MED.	SEC. 6-1965 (1981)	EXPRESS & INFORMED CONSENT NEEDED	SEC. 6-1969 (1981)
FLORIDA	Y	RT.TO BE FREE FROM UNNEC., EXCESSIVE MED.	WEST'S F.S.A. SEC. 393.13(F)1(1985)	EXPRESS & INFORMED CONSENT NEEDED	WEST'S F.S.A. SEC. 393.13(6) (1985)
GEORGIA	N				
HAWAII	Y	Y,EXCEPT EMERGENCY	TIT. 19, CH. 334E-1(1985)	RT.TO REFUSE	TIT. 19, CH. 334E-2(10) (1985)
IDAHO	Y	Y,EXCEPT EMERGENCY	SEC. 66-412 (SUPP.1988)		
ILLINOIS	Y	Y,U/L NECESSARY	ILL.REV. STAT. 1983, ch.91 1/2, par. 2-107(SUPP.1988)		
INDIANA	Y	MUST PETITION CT.	WEST'S A.I.C. 16-14-1.6-7(1984)	PROCEDURES SET OUT IN:	WEST'S A.I.C. 11-10-4-6 (1984)
IOWA	Y	SHOCK/ CHEMO. THERAPY	I.C.A. SEC. 229.23(1985)		
KANSAS	Y	CONSENT FOR PSYCHOSUR., ELECTRO-SHOCK, HAZ.TREAT.	K.S.A. SEC. 59-2929(1983)	CONSENT FOR EXPERM.MED.	K.S.A. SEC. 59-2929 (1983)
KENTUCKY	Y	Y,SUBJECT TO REVIEW	KY.REV. STAT. ANN. SEC. 202A.191 (BALDWIN 1985)		

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
LOUISIANA		CT.CONSENT FOR SURGERY OR ELECTRO-SHOCK	LSA-R.S. 28:171	NO MEDICATION FOR NON-TREATMENT PURPOSES	LSA-R.S. 28:171P
MAINE	N	REPEALED TITLE 34 M.R.S.A.	SEC. 2251-2255: HOSPITALIZA-TION OF MENTALLY ILL (1988)		
MARYLAND	Y	Y,U/L INADVISABLE	MD.ANN.CODE, HEALTH GEN., SEC. 7-602(1982)		
MASSACHUSETTS	Y	REFUSE SHOCK & LOBO.	ALM GL c123 sec. 23 (1986)		
MICHIGAN	Y	REFUSE SURGERY & SHOCK	M.C.L.A. SEC. 330.1716 (1980)		
MINNESOTA	Y	Y,OTHER THAN FOR MENTAL ILLNESS	M.S.A. SEC. 2538.03 (SUPP.1989)	CONSENT NEEDED FOR PSYCHOTROPIC MED.	M.S.A. sec. 2538.03

MISSISSIPPI					
MISSOURI	Y	CONSENT NEEDED FOR HAZARDOUS TREAT. RT.TO REFUSE ELECTROCONV. THERAPY	V.A.M.A.sec. 630.115(1978) V.A.M.S.sec. 630.130(1978)	CONSENT NEEDED	V.A.M.S. SEC. 630.115 (1978)
MONTANA	Y	CONSENT FOR UNUSUAL OR HAZ. TREAT.	MONT.CODE ANN. SEC. 53-20-146(1987)	CONSENT NEEDED	MONT. CODE ANN. SEC. 53-20-147 (1987)
NEBRASKA	Y	Y, U/L EMERGENCY	R.R.S., 1943 SEC. 83-1066 (SUPP.1988)		
NEVADA	Y	CONSENT BEFORE ANY TREATMENT	N.R.S. 433.484		
NEW HAMPSHIRE					
NEW JERSEY	Y	FREE FROM UNNEC. EXCESS. MED.	N.J.S.A. 30:4-24.2	CONSENT NEEDED	N.J.S.A. 30:4-24.2

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
NEW MEXICO	Y	PSYCHO-TROPIC MED. IF NECESSARY PROTECT	sec. 43-1-15		
NEW YORK	Y	CONSENT FOR SURG., SHOCK, EXPERMT.	N.Y.MENTAL HYGIENE LAW SEC. 33.03 (McKINNEY SUPP.1986)	CONSENT NEEDED	N.Y. MENTAL HYGIENE LAW SEC. 33-03 (McKINNEY SUPP. 1986
NORTH CAROLINA					
NORTH DAKOTA	Y	FREE FROM UNNEC.MED.	sec. 25-03.1-01	CONSENT NEEDED	sec. 25-03.1-01
OHIO	Y	FREE FROM UNNEC. OR EXCESSIVE MED.	OHIO REV.CODE ANN. SEC. 5122.27	CONSENT FOR UNUSUALLY HAZARDOUS TREAT.	OHIO REV.CODE ANN. [SEC. 5122.27.1] SEC. 5122.271 (1982)
OKLAHOMA					

OREGON	Y	FREE FROM UNUS.OR HAZ. TREAT.	SEC. 426.385	CONSENT FOR UNUSUAL HAZ. TREATMENT	SEC. 426.385
PENNSYLVANIA					
RHODE ISLAND	RT.TO RECEIVE NEC. CARE	R.I.GEN.LAWS SEC. 40.1-5.3-14 (SUPP.1988)	CONSENT NEEDED	R.I.GEN.LAWS SEC. 40.1-5.3-13(1988)	
SOUTH CAROLINA	Y	Y, IF NOT RECOGNIZED AS STAND.TREAT.	S.C.CODE SEC. 44-23-1010(1985)		
SOUTH DAKOTA	Y	YES	SDCL TITLE 27B-8-2(1979)	CONSENT NEEDED	SDCL TITLE 27A-12-20, TITLE 27B-8-20 (1979)
TENNESSEE	Y	RT.TO GIVE CONSENT	SEC. 33-3-104		
TEXAS	Y	FREE FROM UNNEC. EXCESS. MED.	VERNON'S ANN.CIV.ST. art. 5547-300	PROHIBITED	VERNON'S AN.CIV.ST. ART. 5547-300

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CONSENT NEEDED	CITATION
UTAH						
VERMONT			VA.CODE SEC. 37.1-85(1983)			VA.CODE SEC. 37.1-84.1 (1983)
VIRGINIA	Y	IF NECESS. TO PROTECT U/L CT. ISSUES STAY	RCWA 71.05.370			
WASHINGTON	Y	SHOCK & SURG. TREATMENT	W.S.A. 51.61		CONSENT NEEDED	W.S.A. 51.61
WEST VIRGINIA						
WISCONSIN	Y	Y				
WYOMING						

LOUISIANA STATUTORY PROVISIONS

Louisiana Revised Statutes, Title 15 section 830

TREATMENT OF MENTALLY ILL AND MENTALLY RETARDED INMATES

A. The department may establish resources and programs for the treatment of mentally ill and mentally retarded inmates, either in a separate facility or as part of other institutions or facilities of the department.

B. On the recommendation of appropriate medical personnel and with the consent of the Department of Health and Human Resources or other appropriate department, the secretary of the Department of Corrections may transfer an inmate for observation and diagnosis to the Department of Health and Human Resources or other appropriate department or institution for a period not to exceed the length of his sentence. If the inmate is found to be subject to civil commitment for psychosis or other mental illness or retardation, the secretary of the Department of Corrections shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and shall be paid by the state. While the inmate is in such other institution his sentence shall continue to run.

C. When, in the judgment of the administrator of the institution to which an inmate has been transferred, he has recovered from the condition which occasioned the transfer, he shall be returned to the department, unless his sentence has expired.

Added by Acts 1968, No. 192, section 1. Amended by Acts 1980, No. 609, section 1, eff. July 23, 1980.

Louisiana Revised Statutes, Title 15, section 830.1

REFUSAL OF TREATMENT BY MENTALLY ILL OR MENTALLY RETARDED INMATES.

A. Whenever a mentally ill or mentally retarded inmate refuses treatment and any staff physician, staff psychiatrist, or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days. If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill or mentally retarded inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided. If the inmate does not have counsel, the court shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and paid by the state.

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety and Corrections that has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this Section shall be in accord with all procedures required by law in the case of judicial commitment. Nothing herein shall be construed to preclude any person in the custody of the Department

of Public Safety and Corrections from any commitment or admission as may be otherwise provided by law.

Amended by Acts 1972, No. 154, section 1; Acts 1977, No. 714, section 1; Acts 1978, No. 680, section 1; Acts 1978, No. 782, section 1, eff. July 17, 1978; Amended by Acts 1987, No. 96, section 1.

Louisiana Revised Statutes, Title 28 section 171

ENUMERATIONS OF RIGHTS; RESTRICTIONS

A. No patient in a treatment facility pursuant to this Chapter shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the state of Louisiana, or the Constitution of the United States solely because of his status as a patient in a treatment facility. These rights, benefits, and privileges include, but are not limited to, civil service status; the right to vote; the right to privacy; rights relating to the granting, renewal, forfeiture, or denial of a license or permit for which the patient is otherwise eligible; and the right to enter contractual relationships and to manage property.

B. No patient in a treatment facility shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court of competent jurisdiction. This determination shall be separate from the judicial determination of whether the person is a proper subject for involuntary commitment.

C. The patient in a treatment facility shall be permitted unimpeded, private and uncensored communication with persons of his choice by mail, telephone, and visitation. These rights may be restricted by the director

of the treatment facility if sufficient cause exists and is so documented in the patient's medical records. The patient's legal counsel, as well as his next of kin or responsible party must be notified in writing of any such restrictions and the reasons therefor. When the cause for any restriction ceases to exist, the patient's full rights shall be reinstated. A patient shall have the right to communicate in any manner in private with his attorney at all times.

The director of a treatment facility shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage, and telephone usage funds shall be provided in reasonable amounts to recipients who are unable to procure such items.

Reasonable times and places for the use of telephones and for visits may be established in writing by the director of any treatment facility.

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility. A person placed in restraints shall have his status reviewed periodically.

E. Seclusion may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall seclusion be utilized solely to punish or discipline a patient, nor is seclusion to be used as a convenience for the staff

of the treatment facility. A person placed in seclusion shall have his status reviewed periodically.

F. No patient confined by emergency certificate, judicial commitment, or non contested status shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

If the director of a treatment facility, in consultation with two physicians, determines that the condition of such a patient is of such a critical nature that it may be life threatening unless major surgical procedures or electroshock therapy are administered, such emergency measures may be performed without the consent otherwise provided for in this Section. No physician shall be liable for a good faith determination that a medical emergency exists.

G. Every patient shall have the right to wear his own clothes; to keep and use his personal possessions, including toilet articles, unless determined by a physician that these are medically inappropriate and the reasons therefor are documented in this medical record. The patient shall also be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases, and to have access to individual storage spaces for his private use. If the patient is financially unable to provide these articles for himself, the treatment facility shall provide a reasonable supply of clothing and toiletries.

H. Every patient shall have the right to be employed at a useful occupation depending upon his condition and available facilities.

I. Every patient shall have the right to sell the products of his personal skill and labor at the discretion of the director of the treatment facility and to keep or spend the proceeds thereof or to send them to his family.

J. Every patient shall have the right to be discharged from a treatment facility when his condition has changed or improved to the extent that confinement and treatment at the treatment facility are no longer required. The director of the treatment facility shall have the authority to discharge a patient admitted by judicial commitment without the approval of the court which committed him to the treatment facility. The court shall be advised of any such discharge. The director shall not be legally responsible to any person for the subsequent acts of behavior of a patient discharged by him in good faith.

K. Every patient shall have the right to engage a private attorney. If a patient is indigent, he shall be provided an attorney by the mental health advocacy service, if he so requests. The attorney provided by the mental health advocacy service or appointed by a court shall be interested in and qualified by training and/or experience in the field of mental health statutes and jurisprudence.

L. Every patient shall have the right to request an informal court hearing to be held at the discretion of the court within five days of the receipt of the request by the court. If the court determines that a hearing is appropriate and if the patient is not represented by an attorney of his own or from the mental health advocacy service, the court shall appoint an attorney to represent the patient.

The purpose of the hearing shall be to determine whether or not the patient should be discharged from the treatment facility or transferred to a less restrictive and medically suitable treatment facility.

M. No provision hereof shall abridge or diminish the right of any patient to avail himself of the right of habeas corpus at any time.

N. Every patient shall have the right to be visited and examined at his own expense by a physician designated by him or a member of his family or an interested party. The physician may consult and confer with the medical staff of the treatment facility and have the benefit of all information contained in the patient's medical record.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medication which he has ordered and which are administered to a patient. A record of medications administered to each patient shall be kept in his medical record. Medication shall not be used for nonmedical reasons such as punishment or for convenience of the staff.

Q. A person admitted to a treatment facility has the right to an individualized treatment plan and periodic review to determine his progress. The appropriate staff of the facility shall review the person's progress at least at intervals of thirty, ninety, one hundred eighty days and every one hundred eighty days thereafter. The staff shall

enter into the person's record his response to medical treatment, his current mental status and specific reasons why continued treatment is necessary in the current setting or whether a treatment facility is available which is medically suitable and less restrictive of the patient's liberty.

R. A person admitted to a treatment facility has the right to have available such treatment as is medically appropriate to his condition. Should the treatment facility be unable to provide an active and appropriate medical treatment program, the patient shall be discharged.

Louisiana Code of Criminal Procedure Art. 641

MENTAL INCAPACITY TO PROCEED DEFINED

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Louisiana Code of Criminal Procedure Art. 642

HOW MENTAL INCAPACITY IS RAISED; EFFECT

The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

Louisiana Code of Criminal Procedure Art. 647

DETERMINATION OF MENTAL CAPACITY TO PROCEED

The issue of the defendant's mental capacity to proceed shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.

Source: New; cf. former R.S. 15:267; A.L.I. Model Penal Code, section 4.06(1) (Tent. Draft No. 4, 1955). Acts 1966, No. 310, section 1.

Louisiana Code of Criminal Procedure Art. 648

PROCEDURE AFTER DETERMINATION OF MENTAL CAPACITY OR INCAPACITY

A. The criminal prosecution shall be resumed if the court determines that defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of

capacity continues. If the court determines that the defendant's mental capacity is likely to be restored within ninety days by outpatient care and treatment at an institution as defined by R. S. 28:2 (28) while remaining in the custody of the criminal authorities, and if the person is not charged with a felony or a misdemeanor classified as an offense against the person and is considered by the court to be unlikely to commit crimes of violence, then the court may order outpatient care and treatment at any institution as defined by R.S. 28:2(28). Defendants committed to the custody of the Department of Health and Human Resources shall be given inpatient care and treatment at an institution as defined by R.S. 28:2(28); however, a person charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence shall maintain in custody at a forensic unit at Feliciana Forensic Facility.

B. (1) In no instance shall custody, care, and treatment exceed the time of the maximum sentence the defendant could have received if convicted of the crime with which he is charged. At any time after commitment and on the recommendation of the superintendent of the institution that the defendant will not attain the capacity to proceed with his trial in the foreseeable future, the court shall, within a reasonable time and after at least ten days notice to the district attorney and defendant's counsel, conduct a contradictory hearing to determine whether the mentally defective defendant is, and will in the foreseeable future be, incapable of standing trial and whether he is a danger to himself or others.

(2) If, after the hearing, the court determines the defendant is, and will in the foreseeable future be, incapable of standing trial and may be released without danger to himself or others, the court shall release the defendant on probation. The probationer shall be under the supervision of the Department of Public Safety and Corrections, division of probation and parole, and subject to such conditions as may be imposed by the court.

(3) If, after the hearing, the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. However, the director of the institution designated for the patient's treatment shall, in writing, notify the court and the district attorney when the patient is to be discharged or conditionally discharged.

C. The superintendent of the forensic unit of the Feliciana Forensic Facility shall admit only those persons charged with a felony or a misdemeanor classified as an offense against the person and committed on recommendation of a sanity commission, persons charged with a felony or a misdemeanor classified as an offense against the person and found not guilty by reason of insanity, and persons transferred to the forensic unit from the state correctional institutions.

Amended by Acts 1982, No. 495, section 1; Acts 1983, No. 399, section 1; Acts 1987, No. 928, section 1, eff. July 20, 1987; Acts 1988, No. 383, section